Supreme Court, U.S.
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In the Supreme Court of the United States

TVT RECORDS AND TVT MUSIC, INC.,
PETITIONERS,

v.

THE ISLAND DEF JAM MUSIC GROUP
AND LYOR COHEN,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit, in conflict with the law of the First, Third, Fourth and Fifth Circuits, erred by setting aside the jury's verdict and granting judgment as a matter of law, on grounds not preserved in Respondents' motions under Federal Rule of Civil Procedure 50, based on its view that the strictures of Rule 50 do not apply to "questions of law."

RULE 29.6 STATEMENT

Neither Petitioner TVT Records, nor Petitioner TVT Music Inc., is publicly traded. Petitioners' corporate parent, Tee Vee Toons, Inc., is not publicly traded.

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3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 10.15[A], at 10-121 18

9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2540, at 373 (1995) 10

OPINIONS BELOW

The District Court's opinions can be found at 244 F. Supp. 2d 263 (Pet. App.[1] 22a-45a), 2003 U.S. Dist. LEXIS 5909 (Pet. App. 46a-56a), 262 F. Supp. 2d 188 (Pet. App. 57a-84a), and 279 F. Supp. 2d 366 (Pet. App. 85a-158a). The Second Circuit's opinion is reported at 412 F.3d 82 (Pet. App. 1a-21a).

JURISDICTION

The Second Circuit denied TVT's petition for rehearing and suggestion for rehearing *en banc* on January 3, 2006 (Pet. App. 159a-160a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Rule 50 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Judgment as a Matter of Law.
>
> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.
>
> (b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a

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[1] "Pet. App." refers to the Petitioner's Appendix, attached hereto.

> matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment ....

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

STATEMENT OF THE CASE

This case arises out of actions by Island Def Jam Music Group, a division of UMG Recordings, Inc. ("IDJ"), and IDJ's then chairman Lyor Cohen ("Cohen") (collectively "Respondents") to thwart Petitioners TVT Records' and TVT Music, Inc.'s (collectively "TVT") efforts to create and market an album by superstars in the hip-hop music industry. TVT sued Respondents over their conduct, and a jury awarded it $132 million. However, the Second Circuit set aside the verdict and granted judgment as a matter of law ("JMOL") to Respondents. It did so on grounds that Respondents failed to preserve in compliance with the clear requirements of Federal Rule of Civil Procedure 50. The decision below warrants this Court's attention for two reasons.

First, it contravenes the Court's longstanding precedents mandating strict compliance with Rule 50 and emphasizing the Rule's critical role in protecting the Seventh Amendment right to jury trial. These authorities include the recent decision in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 126 S. Ct. 980 (2006). *Unitherm* held

that appellate courts may not review or set aside a jury's verdict for lack of legally sufficient evidence except on grounds raised in both a preverdict Rule 50(a) motion *and* a postverdict Rule 50(b) motion.

Second, this case presents an appropriate vehicle to resolve a deep and important circuit split on whether waiver under Rule 50 may be excused to permit review of "legal" questions that have not been preserved in pre- and postverdict motions for JMOL. The Second Circuit justified its decision to reach issues that Respondents forfeited by invoking a purported nontextual exception to Rule 50 for review of "questions of law." This exception has been adopted by the Sixth, Ninth, Tenth and Federal Circuits. However, it contradicts the plain language of Rule 50, which speaks of "legal[] sufficiency" and commands district courts to resolve "the legal questions raised by" Rule 50 motions. The exception, moreover, conflicts with the law in the First, Third, Fourth and Fifth Circuits. Because of the frequency with which this issue arises and the importance of Rule 50 and the jury trial right it protects, the Court should grant the petition and reverse the judgment below.

Factual Background

The underlying dispute arose out of a scheme by Respondents to obstruct TVT's distribution of an album by Cash Money Click ("CMC"), a hip-hop music group signed to TVT. Pet. App. 2a.[2] One of CMC's three members was Jeffrey Atkins (professionally known as "Ja Rule"), a popular rap artist. *Id.* CMC had been introduced to TVT in the mid-1990s by Irving Lorenzo (professionally known as "Irv Gotti"), a producer and talent finder who was then employed by TVT. *Id.* at 88a n.4. In 1996, Gotti left TVT and joined IDJ. *Id.* at 2a. Two years later, Ja Rule also left TVT and signed an exclusive recording contract with IDJ.

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[2] "Apx." refers to the Appendix previously submitted to the United States Court of Appeals for the Second Circuit in this case. "Special Apx." refers to the Special Appendix submitted to the United States Court of Appeals for the Second Circuit.

Id. IDJ and Gotti subsequently formed a 50%-50% joint venture known as "Murder, Inc." ("M/I"), in which Cohen and Gotti were co-executives. *Id.* at 94a n.6. Ja Rule, with Gotti as producer, enjoyed enormous success with IDJ and M/I and became one of the recording industry's major stars. *See id.* at 2a-3a.

In early 2001, TVT, Gotti and Ja Rule discussed recording an album reflecting the development of Ja Rule's career from his musical roots with the CMC group to his superstardom (the "CMC Album"). *Id.* at 3a. The album would include new CMC recordings produced by Gotti as well as remixed versions of CMC tracks originally recorded in the 1990s and owned by TVT. *Id.* at 23a-24a. In July 2001, TVT entered into a contract, the "Heads of Agreement" ("HOA"), whereby Gotti, Ja Rule, and M/I agreed with TVT to produce the CMC Album. *Id.* The HOA made Gotti and Ja Rule responsible for securing any necessary consents for the project from Respondents. *Id.* at 24a.

Gotti then approached Cohen to seek his consent to the project. *Id.* IDJ never intended to grant its consent for the CMC Album, however. *See id.* at 101a, n.9; Apx. 1013-22, 1660-67. Indeed, Cohen dissembled because he hoped that by appearing to agree to a project that his star artists wanted to pursue he could obtain control over the old TVT-owned recordings that contained Ja Rule performances while also currying favor with Gotti and Ja Rule for their impending contract re-negotiations. Special Apx. 42. Cohen also discussed the matter with TVT's CEO Steve Gottlieb and eventually agreed to consent to the CMC project based on mutually agreed-upon terms. Pet. App. 89a. These terms were memorialized in a separate "Side Letter Agreement" ("SLA") between TVT and IDJ in October 2001. *Id.* at 4a. Although the SLA was signed by a senior vice president at IDJ, the executed document was withheld from TVT and remained stored at IDJ's offices, on which basis IDJ later claimed no agreement was ever reached. *See id.* at 64a-65a. However, based on IDJ's assurances that it

had agreed to the SLA, the HOA parties began work on the CMC Album in October 2001. *Id.* at 4a.

TVT made significant financial expenditures towards the project, including a $400,000 advance paid to Gotti. *Id.* TVT also invested in promotional efforts. As part of the promotion, and in consideration for IDJ's consent to the CMC Album project, TVT granted IDJ permission in June 2002 for the use of a 1990s-era CMC recording ("Get Tha Fortune") and a newly-created CMC recording ("The Rain") in a CD and DVD entitled "Irv Gotti Presents: The Inc." *Id.* at 90a.

From October 2001 through August 2002, Gotti and Ja Rule continued recording and remixing the CMC Album. *Id.* at 4a-5a. IDJ never objected to TVT's (or Gotti's or Ja Rule's) public marketing of the album for a November 2002 release. To the contrary, during the summer of 2002, IDJ itself advertised the impending release of the CMC Album on one of its corporate websites. *Id.* at 34a. During this same period, IDJ successfully renegotiated its agreements with Gotti and Ja Rule. *Id.* at 5a. IDJ also secretly negotiated incentives for the artists to deliver the CMC recordings and the rights to the CMC recordings, both old and new, to IDJ rather than to TVT. *Id.*

After renewing their agreements with Gotti and Ja Rule and after substantial work on the CMC Album had been completed, IDJ and Cohen reneged on their promises to TVT; claimed that they had never agreed to the SLA; and asserted that no valid contract permitting Gotti's or Ja Rule's performance on any CMC Album existed. Apx. 2309-10. By letter dated August 14, 2002, IDJ informed TVT that it did not accept and had never accepted the terms of the October 2001 SLA. Pet. App. 89a. Gotti, thus, was forbidden from delivering the CMC Album to TVT. Apx. 1013-22. It had been IDJ's intention from the beginning to obtain tracks recorded by Gotti and Ja Rule for the CMC Album and incorporate them into IDJ's own November 2002 release of Ja Rule's new solo album "The Last Temptation." Pet. App. 5a.

Proceedings Before the District Court

1. On August 20, 2002, TVT filed suit alleging, *inter alia*, breach of contract, tortious interference with contract, and copyright infringement.[3] The District Court granted in part TVT's motion for a preliminary injunction and issued an order enjoining Respondents from preventing completion of the CMC Album and from making further use of the CMC recordings licensed by TVT. Special Apx. 245. The District Court further enjoined Respondents from including any of the recordings prepared for the CMC Album on any of their upcoming releases. *Id.* Trial was scheduled on an expedited basis.

2. On December 23, 2002, Respondents filed a motion for summary judgment. Apx. 137. Respondents argued in their reply brief, *inter alia*, that if IDJ were found to have been a party to the SLA, then the SLA's terms would also make IDJ a party to the HOA, and therefore neither IDJ nor Cohen could be liable for tortious interference with the HOA under New York law. Pet. App. 33a. Respondents sought dismissal of the copyright infringement count on the ground that TVT had failed to produce sufficient evidence that it reasonably relied on IDJ's representations in granting IDJ the license. *Id.* at 28a. They did *not* argue that TVT had failed to rescind its license, or suggest that rescission was required to sue a licensee for infringement.

The District Court rejected Respondents' arguments, and the case proceeded to trial.

3. The District Court bifurcated the trial into liability and damages phases. During the liability phase,

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[3] TVT's complaint also alleged counts for fraudulent concealment, Apx. 64, breach of the duty of good faith and fair dealing, *id.* at 61, and promissory and equitable estoppel, *id.* at 63, none of which are the subject of this petition. IDJ did not appeal from the judgment against it for breach of the SLA. Respondents counterclaimed against TVT and its CEO (Steven Gottlieb), alleging tortious interference with respect to IDJ's exclusive contracts with Ja Rule and Gotti. *Id.* at 442. Respondents' claims were rejected by the jury, and Respondents did not appeal.

Respondents focused their proof on demonstrating that Gotti and Ja Rule, as IDJ's "exclusive" artists, had no authority to enter into the HOA, and contended that the HOA reflected TVT's tortious interference with IDJ's relationship with the artists. Apx. 1245-61. Respondents separately argued that no contract existed between TVT and IDJ because IDJ had never delivered a signed copy of the SLA to TVT. *Id.* Accordingly, in their Rule 50(a) motion, Respondents omitted any reference to their summary judgment argument that they were "parties" to either the SLA or the HOA, or that these two "invalid" documents could form an integrated contract, a position directly contrary to the evidence they presented at the trial.[4] *Cf. id.* at 1189-99. Respondents also made no mention in their Rule 50(a) motion—nor, indeed, at any other phase of these proceedings—of the argument later articulated by the Second Circuit as grounds for dismissing the jury's verdict of copyright infringement (*i.e.*, that TVT had not "sued for rescission of the licenses" it granted IDJ and was therefore "not entitled to assert a copyright claim"). They argued that they had valid licenses and denied engaging in fraud to induce TVT to grant the licenses. *Id.* at 1196-98. The District Court refrained from ruling on the Rule 50(a) motions until after the jury returned its verdicts in favor of TVT.[5]

4. The jury found for TVT on all counts. Pet. App. 86a. After a bifurcated damages trial, the jury held that Cohen and IDJ were jointly and severally liable for tortious

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[4] The trial judge ultimately put the "single contract" issue in the jury's hands by instructing them that if they found that the HOA and SLA were "a single, integrated contract" to which IDJ was a party, then IDJ could not be liable for tortious interference. Apx. 1315.

[5] When the District Court issued its Rule 50(a) decisions after the jury returned its verdicts in favor of TVT, it *sua sponte* addressed and rejected Respondents' argument on summary judgment that the HOA and SLA should be read as a "single contract" even though Respondents had not raised this issue at the Rule 50(a) stage. Pet. App. 51a-52a.

interference with the HOA in the amount of $22,358,713. Special Apx. 16. In addition, the jury awarded TVT $126,720 for breach of the SLA contract. *Id.* The jury also awarded $56,025,000 and $52,275,000 in punitive damages against Cohen and IDJ, respectively. *Id.* Finally, pursuant to a favorable jury verdict on its copyright claims and section 504 of the Copyright Act, TVT elected to receive actual damages for infringement of "The Rain" in the amount of $409,375, and elected to receive statutory damages in the amount of $150,000 for the willful infringement of "Get Tha Fortune." *See id.* at 15-16, n.3. In a subsequent opinion, the District Court granted TVT's motion for attorneys' fees and costs pursuant to Section 505 of the Copyright Act in the amount of $222,822.53. *Id.* at 8.[6]

5. Respondents renewed their motions for JMOL pursuant to Rule 50(b) after the jury returned its damages verdict. Apx. 2053. Respondents' "renewal" motion took positions that they had not raised in their Rule 50(a) motions or had never raised at any point in the litigation. For example, Respondents attempted to revive their summary judgment position that IDJ was a party to the HOA (now that the jury had found it was a party to the SLA) and that they therefore could not be liable for interfering with the HOA. Pet. App. 93a. Respondents also argued, for the first time, that IDJ could not have interfered with the HOA because it was a party to that agreement by virtue of its stake in M/I.[7] *Id.* The District Court rejected each of Respondents' arguments. *Id.* at 93a-94a.

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[6] Respondents moved for remittitur pursuant to Rule 59. The District Court upheld the $23.9 million awarded in compensatory damages, but remitted Cohen's punitive damages to $3 million and IDJ's punitive damages to $26,125,000. TVT elected to accept the District Court's remittitur. Special Apx. 60.

[7] The District Court refused to review IDJ's argument that it was a party to the HOA based on its stake in M/I because:

> to the extent Defendants accurately characterized Gotti's and Murder, Inc.'s involvement in the Heads of Agreement as a

With respect to TVT's copyright claims, Respondents again made no rescission argument.

Proceedings On Appeal

The Second Circuit vacated the jury's verdict on the tortious interference and copyright infringement claims, set aside the damages awarded to TVT, and entered JMOL in favor of Respondents. *Id.* at 1a-2a. The Court of Appeals expressly acknowledged that its decision to award JMOL on these claims rested on legal issues that Respondents had not raised in their motion for JMOL under Rule 50(a). *Id.* at 8a n.4.

The Second Circuit held that the jury's determination that Respondents' conduct tortiously interfered with the HOA was incorrect as a matter of law based on its conclusion that the HOA and SLA should be construed as a "single contract." *Id.* at 10a. The court expressly found that it "was not troubled by the fact that the defendants did not reiterate this claim in their Rule 50(a) motion because" Respondents raised it in their "reply memorandum in further support of their summary judgment motion and in their pre-trial memorandum." *Id.* at 8a n.4. The court found the summary judgment argument provided sufficient notice and that Respondents were under no "obligation ... to make pests of themselves." *Id.* The Second Circuit further explained that the "single contract" defense was "a matter of law for the court" because "the documents in question reflect no ambiguity as to whether they should be read as a single contract." *Id.* at 9a. In the court's view, the determination of such issues of law that rendered the evidence legally insufficient did not have to be raised on Rule 50. *See id.* at 7a-8a (concluding "that TVT's claim[] for

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"business project separate from the IDJ/Gotti joint venture," they cannot now invoke that very joint venture agreement as a basis to assert themselves as parties to the Heads of Agreement. Also, in their Rule 50(a) motions, neither Defendant raised the argument that IDJ was a party to the Heads of Agreement by virtue of Murder, Inc.'s involvement.

Pet. App. 95a-96a.

tortious interference ... fail[s] for lack of a legally sufficient evidentiary basis").

As to TVT's copyright infringement claim, the Second Circuit reversed on a ground that Respondents had never raised, even during the course of the appeal, and that the District Court never addressed: namely, that TVT was required to formally rescind its licenses prior to filing a copyright infringement suit. *Id.* at 16a (summarizing Respondents' argument on appeal and "agree[ing] that the copyright verdict and damages award cannot stand as a matter of law, but not for the reasons advanced by IDJ and Cohen"). The court held that it could review and vacate the jury verdict (and grant JMOL) on this ground even though it had not been presented, let alone preserved, in Respondents' Rule 50 motions. The court reasoned that "when the trial court denies a Rule 50 motion, both that denial and 'errors of law in the trial court may be raised on appeal.'" *Id.* at 15a n.8 (citing 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2540, at 373 (1995)).[8]

REASONS FOR GRANTING THE WRIT

The Second Circuit set aside two jury verdicts in favor of TVT and awarded JMOL to Respondents on grounds that Respondents did not preserve under Rule 50. Certiorari is warranted because the decision below contravenes the unambiguous requirements of Rule 50 and this Court's precedents and implicates a significant issue on which a mature and acknowledged circuit split has developed.

This Court has repeatedly held that strict compliance with Rule 50 is a necessary predicate to obtaining appellate review of a jury's verdict. Contrary to the Second Circuit's

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[8] The Second Circuit also reversed the jury's verdict on TVT's fraudulent concealment claim on another theory Respondents failed to preserve in their Rule 50(a) motion—that they had no duty to disclose. However, the court rejected TVT's argument of waiver, holding that the argument that the fraud claim was duplicative of the contract claim subsumed the lack of duty issue. Pet. App. 12a.

view, Rule 50 does indeed require parties to "make pests of themselves" if they wish to preserve for appeal an argument that they are entitled to JMOL "under the controlling law." Moreover, the Court has emphasized that the procedural requirements of Rule 50 are critical to safeguarding the Seventh Amendment right to jury trial. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 126 S. Ct. 980, 986 n.4 (2006); *Johnson v. N.Y., New Haven & Hartford R.R. Co.*, 344 U.S. 48, 52 (1952); *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 217 (1947). And, as this Term's decision in *Unitherm* highlights, appellate review of a jury verdict is not permitted except on grounds expressly raised in a preverdict motion pursuant to Rule 50(a) *and* renewed in a postverdict Rule 50(b) motion. 126 S. Ct. at 989; *id.* at 984 n.1. The Second Circuit, however, reversed the verdict on TVT's tortious interference claim on a theory Respondents elected not to raise at the Rule 50(a) stage; and reversed the copyright verdict on grounds that Respondents never argued, and the District Court never addressed.

The Second Circuit relied on these issues as grounds for JMOL—though Respondents failed to preserve them—based on an exception for "legal" issues that contravenes the unambiguous requirements of Rule 50. The Second Circuit will excuse noncompliance with Rule 50 even where (as in this case) the "legal" issue is directly related to the questions the jury decided, and must thus be considered to assess whether the facts were sufficient as a matter of law—the central question under Rule 50. The Sixth, Ninth, Tenth and Federal Circuits take the same approach. These Circuits reason that Rule 50 motions "challenge the sufficiency of the evidence rather than the correctness of questions of law," and, therefore, that "[a] party who properly raises an issue of law before the case goes to the jury 'need not include the issue in a motion for a directed verdict in order to preserve the question on appeal.'" *Ruyle v. Continental Oil Co.*, 44 F.3d 837, 841 (10th Cir. 1994) (citation omitted), *cert. denied*, 516 U.S. 906 (1995).

The First, Third, Fourth and Fifth Circuits have rejected this approach. These Circuits point out that appellate review of a jury verdict is limited to issues raised in a Rule 50(a) motion and renewed at the Rule 50(b) stage; that denials of summary judgment are not reviewable where the movant subsequently loses a full trial on the merits because the judgment must be reviewed based upon the full trial record; that Rules 50 and 56 address the same questions and apply the same standard; and that the distinction drawn by other Circuits between "legal" questions and "sufficiency" questions is more imagined than real and would improperly circumvent the procedural requirements of Rule 50. Thus, the First, Third, Fourth and Fifth Circuits strictly enforce the requirements of Rule 50; TVT would have prevailed had this case been tried in any of those circuits.

This conflict is important and warrants this Court's review. The issue arises with great frequency and may be implicated in any civil case resolved by a jury trial, as the large number of appellate decisions addressing it makes clear. A uniform rule would benefit litigants and lower court judges by providing clear guidance on what parties must do to preserve arguments for appeal after jury trials. The Court should grant certiorari to resolve the split and prevent the circuits that follow the approach of the Second Circuit from continuing to subvert the letter and spirit of Rule 50 and undermine Seventh Amendment rights by reviewing unpreserved legal issues that bear on whether the evidence was sufficient as a matter of law. Alternatively, at the very least, the Court should grant the petition and summarily vacate the judgment below to provide the Second Circuit with an opportunity to reconsider its decision in light of *Unitherm*, which post-dates that decision.

I. THE SECOND CIRCUIT'S DECISION VIOLATES RULE 50 AND SQUARELY CON-FLICTS WITH THIS COURT'S PRECEDENT AND THE LAW OF THE FIRST, THIRD, FOURTH AND FIFTH CIRCUITS

A. Rule 50 Prohibits Appellate Courts From Reviewing Issues That Were Not Properly Preserved In Both A Preverdict And Postverdict Motion For JMOL.

1. Federal Rule of Civil Procedure 50 establishes the procedural requirements for challenging the legal sufficiency of the evidence in a jury trial. It provides that such challenges must be raised before the case is submitted to the jury, and, if necessary, renewed after the verdict and entry of judgment. Rule 50(a), which governs preverdict motions for JMOL, authorizes district courts to grant JMOL if "during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). Significantly, the Rule speaks in terms of "legal[] sufficien[cy]" and authorizes district courts to grant JMOL on claims or defenses that cannot be maintained "under the controlling law." *Id.* Thus, the Rule clearly contemplates that parties will raise legal questions in their Rule 50(a) motions.

The Rule itself and the Advisory Committee Notes make plain that a party may not obtain JMOL postverdict except on legal or factual grounds the party *specifically* raised at the Rule 50(a), preverdict stage. Rule 50(a)(2) requires that the movant "*specify* the judgment sought and *the law and the facts* on which the moving party is entitled to judgment" (emphasis added). Rule 50(b), which articulates the procedural requirements for making a JMOL motion postverdict, allows the trial judge to defer decision on the preverdict motion and submit the case to the jury, but "subject to the court's later deciding the *legal questions* raised by the motion" (emphasis added). This language

further confirms that Rule 50 encompasses not only arguments about factual sufficiency, but also legal issues.

Rule 50(b) states that in order to preserve any argument the movant must "renew its request for [JMOL] by filing a motion no later than 10 days after entry of judgment." The Advisory Committee Notes to the 1963 Amendment of Rule 50(b) also highlight the need to raise arguments at the Rule 50(a) stage in order to preserve them, stating: "A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence." 31 F.R.D. 587, 645 (1963). This Court has also recently reiterated that litigants may only obtain JMOL postverdict on grounds they specifically raised in their preverdict Rule 50(a) motion, stating in its *Unitherm* opinion: "'A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.'" 126 S. Ct. at 984 n.1 (quoting Amendments to Federal Rules of Civil Procedure ("Amendments"), 134 F.R.D. 525, 687 (1991)).

Unitherm, moreover, is the most recent in a long line of decisions by this Court holding that strict compliance with Rule 50 is a necessary predicate to appellate review of a jury's verdict. 126 S. Ct. at 988; *see Johnson*, 344 U.S. at 50; *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 572-73 (1948); *Cone*, 330 U.S. at 218; *cf. Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 325 (1967). In *Unitherm*, the defendant moved for JMOL at the Rule 50(a) stage, but failed to renew its motion for JMOL pursuant to Rule 50(b). 126 S. Ct. at 984. The Federal Circuit held that the defendant's failure to file a postverdict motion for JMOL did not preclude the defendant from seeking a new trial on appeal. *Id.* This Court reversed, holding that "a party may only pursue on appeal *a particular avenue of relief* available under Rule 50(b), namely the entry of judgment or a new trial, when that party has complied with the Rule's filing requirements by requesting *that particular relief* below." *Id.* at 986 (emphasis altered). The Court further held that under its prior precedents, including *Cone*, *Globe Liquor*, and

Johnson, the district court and court of appeals are "powerless" to provide relief that was not requested in a preverdict Rule 50(a) motion and renewed in a postverdict Rule 50(b) motion. *Id.* at 985-86, 988.

2. In this case, the Second Circuit set aside the jury verdicts for TVT on its tortious interference and copyright claims and granted JMOL for Respondents on theories that Respondents failed to preserve in their Rule 50 motions. Its decision flatly contravenes the strict requirements of Rule 50. First, as the Second Circuit expressly acknowledged, Respondents did not argue in their Rule 50(a) motion that the HOA and SLA were one contract, Pet. App. 8a n.4; instead, they argued that Gotti and Ja Rule had never stopped performing under the HOA. Apx. 1189-90. The Second Circuit nonetheless excused this waiver, characterizing whether the HOA and SLA "should be read as a single contract" as "a matter of law for the court," and placing emphasis on Respondents' arguments in their reply brief on summary judgment. Pet. App. 8a n.4. Second, the lower court granted JMOL on the copyright claim because TVT "has neither sued for recession of the licenses nor alleged the breach of any covenant related to their grant." *Id.* at 16a. It did so even though Respondents never made this argument at any stage in the District Court or on appeal, and even though TVT never had any reason or opportunity to present arguments or evidence to the jury on the issue.

The court below relied on a controversial theory that has split the circuits to excuse Respondents' waiver. The Second Circuit disregarded Respondents' failure to comply with Rule 50 regarding both the tortious interference and copyright claims on the theory that appellate courts may grant JMOL on "legal questions" even if the movant did not raise them in Rule 50 motions at and after trial. *Id.* at 8a n.4, 15a n.8.[9]

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[9] The only authority on which the Second Circuit relied for this proposition was a passage from Wright & Miller (quoted *supra* at 10).

Earlier Second Circuit cases have also invoked a purported exception to Rule 50 for "questions of law." For example, in *Rothstein v. Carriere*, 373 F.3d 275 (2d Cir. 2004), a malicious prosecution case, one of the central issues put to the jury was whether there was probable cause to arrest the plaintiff. *Id.* at 283. The defendant moved for summary judgment, arguing that the grand jury's indictment of the plaintiff created a presumption that there was probable cause. *Id.* The district court denied the defendant's motion, holding that the grand jury proceedings were irrelevant, *id.*; the case proceeded to trial and the defendant failed to raise the issue under Rule 50. *Id.* at 284. The Second Circuit nonetheless entertained this issue on appeal. *Id.* It reasoned that "where the trial court's denial of a summary judgment motion is not based on the sufficiency of the evidence, but on a question of law, the rationale behind Rule 50 does not apply, and the need for such an objection is absent." *Id.* And in *Pittman v. Grayson*, 149 F.3d 111, 119-20 (2d Cir. 1998), *cert. denied*, 528 U.S. 818 (1999), the court decided to review an issue—whether certain behavior "constituted an actionable tort under New York law"—it deemed "purely legal" notwithstanding the appellant's failure to comply with Rule 50 (or even raise it in a summary judgment motion).

3. The Second Circuit's approach disregards the importance of Rule 50 and its function in safeguarding the Seventh Amendment right to jury trial as established by *Unitherm* and its predecessors. As both the majority and dissent acknowledged in *Unitherm*, the failure to file a Rule 50(a) motion implicates a party's Seventh Amendment right to trial by jury. *See* 126 S. Ct. at 986 n.4; *id.* at 990 n.* (Stevens, J. dissenting); *see also Johnson*, 344 U.S. at 52;

However, the language of the treatise does not address how such "errors of law" are to be preserved, and does not address all the authorities from the First, Third, Fourth, Fifth, Seventh, and Eighth Circuits discussed *infra*. The only Court of Appeals decisions cited in the treatise are a Ninth Circuit case that aligns with the Second Circuit's position and a 1948 Fifth Circuit case that does not appear to involve a waiver issue.

Cone, 330 U.S. at 217. It does so by ensuring that an opportunity is given to "cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment." Amendments, 134 F.R.D. at 686. For example, a plaintiff confronted by a specific deficiency raised in a Rule 50(a) motion could move to re-open its case to introduce proof on that issue. Also, Rule 50(a) motions are typically made after the plaintiff rests, so notice in the motion allows the plaintiff to use cross-examination during the defense's case, or its own rebuttal, to remedy the alleged defect.

Moreover, the distinction the Second Circuit has drawn between "legal" issues and those bearing on sufficiency of the evidence is inconsistent with Rule 50 itself, which speaks of an enquiry into whether there is a "legally sufficient evidentiary basis" for the jury's verdict and authorizes district courts to grant JMOL based upon the "controlling law." Fed. R. Civ. P. 50(a)(1). The issues reached by the Second Circuit here to reverse the jury verdict and grant JMOL to Respondents were inextricably intertwined with the issues put to the jury: for example, the court held that the HOA and SLA were one contract, or in other words, that the evidence was insufficient to show tortious interference because Respondents were not strangers to the HOA. This issue, however, was before the jury, which was instructed that:

> If you find that the parties to the Heads of Agreement did not intend the contract to perform a single, integrated contract with the side-letter agreement, you can find that IDJ was not a party to the Heads of Agreement, and IDJ could be liable for tortious interference with contract. Conversely, if you find that the parties to the Heads of Agreement intended that contract to form a single, integrated contract with the side-letter agreement, then you can find IDJ was a party to the Heads of Agreement,

> and defendants cannot be held liable for tortious interference with contract ....

Apx. 1315.[10]

Likewise, the circuit's *sua sponte* theory on rescission was not a ruling on a "purely legal" issue divorced from the issues before the jury, but rather a conclusion that the evidence presented to the jury was insufficient because it found no evidence in the record that TVT had rescinded the license. The issues before the jury included whether IDJ procured the license by fraud—*i.e.*, false promises to consent to TVT's release of the CMC Album. *See, e.g.*, Apx. 1325-27 (jury instructions). And if, as the jury plainly found, IDJ engaged in fraud and failed to comply with its obligations to cooperate with TVT on the CMC Album, then there was no consideration for the licenses and no requirement of rescinding before suing for infringement. *See, e.g., Graham v. James*, 144 F.3d 229, 237 (2d Cir. 1998) ("'[I]f the nature of a licensee's violation consists of a failure to satisfy a condition to the license ..., it follows that the rights dependant upon satisfaction of such condition have not been effectively licensed, and therefore, any use by the licensee is without authority from the licensor and may therefore, constitute an infringement of copyright.'" (quoting 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 10.15[A], at 10-121) (omission in original)). However, TVT never had the opportunity to argue these points because no one ever raised rescission before the appeal was decided.

The Second Circuit's exception threatens to swallow Rule 50 and erode Seventh Amendment rights. As the Fifth Circuit, which is on the other side of the split, has explained:

> [W]here a party has a judgment rendered against him based on an adverse jury verdict, judgment may not be rendered for him on appeal (and j.n.o.v. in his

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[10] Indeed, Respondents themselves requested a similar instruction. Trial Transcript, Mar. 15, 2003: 1281:16-1287:14.

> favor may not be granted) unless that party has moved for a directed verdict in the district court. However, reviewing on appeal a pretrial denial of a motion for summary judgment would circumvent [Rule 50] by allowing us to reverse and render even when no motion for directed verdict and motion for j.n.o.v. had been made at trial.

Black v. J.I. Case Co., 22 F.3d 568, 572 (5th Cir. 1994) (citations omitted).

The similarity of Rules 50 and 56, as well as the distinct role that each plays in the administration of our system of justice, also illustrate why it is necessary to limit appellate review to issues that have been preserved pursuant to Rule 50. JMOL as provided for in Rule 50 and summary judgment as provided for in Rule 56 resolve the same issues using the same standard. Amendments, 134 F.R.D. at 684-85 (noting that use of the term "judgment as a matter of law" in Rule 50 was a recognition of "the relationship between the two rules," and that the rules apply the same standard). They both determine whether there is a genuine issue of material fact, sometimes by reference to the legal theories posited by the parties (*e.g.*, where a party's claim is barred by the defendant's interpretation of the governing statute of limitations) and sometimes by reference to the evidence (*e.g.*, where a party has actually offered no evidence). And, both are reviewed *de novo* on appeal. *See, e.g., Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995); *Black*, 22 F.3d at 571 n.5. In addition, "[r]eviewing a Rule 50 determination is preferable to reviewing a summary judgment decision because the Rule 50 decision is based on the complete trial record and not the incomplete pretrial record available at summary judgment." *Chesapeake*, 51 F.3d at 1236.

Furthermore, even apart from the fact that issues of law are always implicated in analyzing the legal sufficiency of the evidence under Rule 50, it is often difficult to distinguish whether an issue is properly construed as "factual" or

"legal." *See, e.g., id.* at 1235. The very questions the Second Circuit addressed here despite Respondents' failure to comply with Rule 50 demonstrate how illusory this distinction can be. For example, the Fourth Circuit, which does not excuse Rule 50 waivers to address "legal" questions, has recognized that "disputes over contract formation and interpretation inevitably involve important factual inquiries," *id.* at 1236, but the Second Circuit characterized Respondents' "single contract" defense as purely legal, Pet. App. 9a.

Finally, there are other important considerations weighing strongly against excusing the failure to comply with Rule 50, as the Second Circuit did when it reached the copyright infringement claim even though it had not been raised on appeal. As then-Judge Scalia has observed:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Thus, Rule 28(a)(4) of the Federal Rules of Appellate Procedure requires that the appellant's brief contain "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Failure to enforce this requirement will ultimately deprive us in substantial measure of that assistance of counsel which the system assumes—a deficiency that we can perhaps supply by other means, but not without altering the character of our institution.

Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.).

For these reasons, and because this issue is implicated in each and every civil jury trial, the Court should grant the writ and reverse the Second Circuit's entry of JMOL in favor of Respondents.

B. The Second Circuit's Rule Excusing Appellants From The Requirements Of Rule 50 To Allow Review Of "Legal" Issues Is Followed By The Sixth, Ninth, Tenth, And Federal Circuits, But Squarely Conflicts With The First, Third, Fourth And Fifth Circuits' Caselaw Prohibiting Such Review.

1. The First, Third, Fourth and Fifth Circuits have expressly rejected the exception to Rule 50 invoked by the Second Circuit in the decision below. For example, the Fourth Circuit held in *Varghese v. Honeywell International Inc.*, 424 F.3d 411 (4th Cir. 2005), that it would not review any pre-trial decision denying summary judgment unless the issues presented in the motion had been preserved pursuant to Rule 50. *See also Chesapeake*, 51 F.3d at 1235. In *Varghese*, the defendant ("Honeywell") moved for summary judgment on the ground that the plaintiff's ("Varghese") state law claims were preempted by ERISA. 424 F.3d at 420. The district court denied the motion, *id.*, and Honeywell lost the trial that followed. *Id.* at 413. It then appealed, arguing, *inter alia*, that the district court erred by holding that the state law claim was not preempted. *Id.* Varghese countered that Honeywell was barred under earlier Fourth Circuit law from raising the issue on appeal because it had not included the argument in its Rule 50 motions. *Id.* at 420-21. Honeywell's response was that the court of appeals could nonetheless entertain the question because JMOL was not the proper avenue for the resolution of a "legal question" such as preemption. *Id.* at 420-21.

The Fourth Circuit rejected Honeywell's argument and refused to reach the preemption claim because Honeywell did not preserve it in its Rule 50 motions. *Id.* at 423. The court relied upon and reaffirmed its prior precedent "*expressly reject[ing]* 'the contention that our review should depend on whether the party claims an error of law or an error of fact.'" *Id.* at 422 (quoting *Chesapeake*, 51 F.3d at

1235). The court reiterated at length the reasons it had refused to create an exception to the requirements of Rule 50 in *Chesapeake*. *See Varghese*, 424 F.3d at 420-21 (discussing reasoning of *Chesapeake*); *supra* at 11-12 (same). The court expressly acknowledged the circuit split on this issue, stating: "[s]everal other circuits have taken a different approach on this issue, allowing appeals from a denial of summary judgment after a trial where the summary judgment motion raised a legal issue and did not question the sufficiency of the evidence." 424 F.3d at 423. It emphasized, however, that this approach "simply conflicts" with the Fourth Circuit's resolution of the matter. *Id.*

The First Circuit has also held that it will not entertain "legal" arguments not preserved under the two-stage procedure of Rule 50. For example, in *Tapalian v. Tusino*, 377 F.3d 1 (1st Cir. 2004), the defendant, a local official, had asserted a *res judicata* defense in a summary judgment motion, arguing that a prior settlement between the plaintiff and the locality barred the lawsuit. The district court denied the motion, holding that there was no evidence that the defendant was in privity with the locality in connection with the earlier settlement. After the case proceeded to trial and the defendant lost before a jury, he attempted to revive the *res judicata* defense on appeal, arguing that he had "substantially controlled" the earlier litigation. The First Circuit, however, held that because the defendant "failed to raise this argument in his Rule 50(a) motion at the close of the evidence, it is deemed waived on appeal." 377 F.3d at 7 n.1. The court cited its earlier decision in *Larch v. Mansfield Municipal Electric Department*, 272 F.3d 63 (1st Cir. 2001), in support of this holding of waiver.

Larch itself illustrates why the Second Circuit's purported distinction between "legal" and "factual" arguments for JMOL is inconsistent with the text and purpose of Rule 50 and also creates practical line-drawing problems. *Larch* involved an action by a terminated state employee against his employer under a state whistleblower statute. After losing a jury trial, the employer contended on

appeal that the decision not to renew the employee's contract was not a "retaliatory action" within the ambit of the whistleblower statute. The First Circuit held that this argument was waived because the employer did not raise it at the Rule 50(a) stage. *Id.* at 71-72. It relied on prior precedent strictly enforcing the Rule and prohibiting appellants from using a Rule 50(b) motion "'to introduce a *legal theory* not distinctly articulated in'" the Rule 50(a) motion. *Id.* at 72 (quoting *Correa v. Hosp. San Francisco*, 69 F.3d 1184, 1196 (1st Cir. 1995), *cert. denied*, 517 U.S. 1136 (1996)) (emphasis added). The court acknowledged the defendant's assertion that the plaintiff was on notice that "'whether there had been retaliation' was a central issue at trial," but pointed out that until the post-verdict motion this "had played out as a *factual* issue, not a legal one." *Id.* This reasoning is fully supported by the language of Rule 50, which plainly contemplates that not only factual sufficiency issues, but also legal arguments will be brought to the district judge's attention in JMOL motions. *See supra* at 13-14.

The Third Circuit too has refused to review issues not preserved under Rule 50 even where they present questions of law. For example, in *Hopp v. City of Pittsburgh*, 194 F.3d 434, 440 (3d Cir. 1999) (Alito, J.), the Third Circuit refused to review the defendant's contention that "42 U.S.C. § 1981 does not provide for a private right of action against municipalities" because the defendant failed to raise this issue in its Rule 50 motions. And in *Bradford-White Corp. v. Ernst & Whinney*, 872 F.2d 1153, 1160-61, n.8 (3d Cir.), *cert. denied*, 493 U.S. 993 (1989), the court reversed the district court decision granting JMOL on a statute of limitations defense that was not raised in defendant's motion for a directed verdict. Both cases cited *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986), which refused to review whether "damages based on a diminution of going concern value" may be awarded because the issue was not raised in the defendant's motion for a directed verdict. *Id.* at 814-15;

cf. Williams v. Runyon, 130 F.3d 568, 571-72 (3d Cir. 1997) (holding that failure to raise exhaustion argument in Rule 50 motions would have waived right to appeal on that basis but that appellee waived the waiver argument).[11]

The Fifth Circuit has taken an approach similar to that of the First, Third and Fourth Circuits. It held that Rule 50 motions "should include *all* possible grounds, legal and factual, for judgment as a matter of law." *Johnson v. Sawyer*, 120 F.3d 1307, 1331 (5th Cir. 1997) (emphasis in original). In *Johnson*, the court refused to review the defendants' statute of limitations argument because they had only raised it in a pre-trial summary judgment motion that was denied and "did not re-urge the limitations issue in their Rule 50 motions at trial." *Id.*

The court relied on its earlier decision in *Black* holding "that [it] will not review the pretrial denial of a motion for summary judgment where on the basis of a subsequent full trial on the merits final judgment is entered adverse to the movant." 22 F.3d at 570 (cited in *Johnson*, 120 F.3d at 1331). In *Black*, the defendant had made a summary judgment motion which was denied and subsequently lost the trial. *Id.* It appealed both the decision denying summary judgment and the decision denying its motions for JMOL. *Id.* In ruling that it would not review the summary judgment decision, the Fifth Circuit observed that another circuit "ha[d] decided a case that could be read as supporting a dual system for evaluating denied motions for summary judgment." *Id.* at 571 n.5. The Fifth Circuit went on to discredit this approach. It noted that it is difficult, if not impossible, to distinguish summary judgments that decide "factual" questions from those that decide "legal" questions

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[11] *Levinson v. Prentice-Hall, Inc.*, 868 F.2d 558 (3d Cir. 1989), which pre-dated most of this line, is not inconsistent with *Hopp* and its predecessors. The court there rejected an argument that "punitive damages may not be awarded under the Law Against Discrimination" where there was a dispute about whether it was preserved in Rule 50 motions without "making a definitive ruling" on whether waiver occurred. *Id.* at 561-62.

because, as evidenced by their *de novo* review on appeal, "[a]ll summary judgments are rulings of law." *Id.* The court also pointed out that district courts often do not explain the grounds of their decisions, which makes the dichotomy impractical. *Id.* The court further explained that its approach was consistent with prior holdings requiring strict compliance with the requirements of Rule 50 that appellate review of jury verdicts be limited to issues raised in Rule 50(a) motions and renewed in Rule 50(b) motions. *Id.* at 571-72.

2. The Sixth, Ninth, Tenth and Federal Circuits, by contrast, have aligned themselves with the approach the Second Circuit has taken. *See, e.g., McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997) (reviewing defendant's claim of absolute immunity, which was unsuccessfully raised on summary judgment but not renewed in Rule 50 motions, on ground that the issue was "purely one of law," and therefore outside the scope of Rule 50), *cert. denied*, 523 U.S. 1050 (1998); *Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1370 (9th Cir. 1987) (addressing statute of frauds defense that appellant failed to include in its Rule 50(a) motion on the ground that "the question of whether a contract is within the statute of frauds is a question of law"); *Ruyle*, 44 F.3d at 840-41 (granting JMOL based on collateral estoppel defense even though appellant failed to preserve it in Rule 50 motions because the issue was argued in a summary judgment motion that was denied and "[a] party who properly raises an issue of law before the case goes to the jury 'need not include the issue in a motion for a directed verdict in order to preserve the question on appeal'" (citation omitted)); *Wilson v. Union Pac. R.R. Co.*, 56 F.3d 1226, 1229 (10th Cir. 1995) (reviewing whether a Safety Appliance Act violation can constitute the cause of an injury once the plaintiff has left the site of the violation under FELA even though the issue, which the court characterized as "a question of law for the court," had not been preserved under Rule 50); *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1108 (Fed. Cir. 2003) (reviewing whether a patent

was obvious even though issue was not raised in Rule 50 motion because the court deemed the issue to be a legal one); *Jurgens v. McKasy*, 927 F.2d 1552, 1557 (Fed. Cir.) (same), *cert. denied*, 502 U.S. 902 (1991).[12]

3. Finally, the Seventh and Eighth Circuits have taken an internally inconsistent approach to the issue. For example, in *Allahar v. Zahora*, 59 F.3d 693, 695-96 (7th Cir. 1995), the Seventh Circuit refused to review a *res judicata* defense that the defendant had raised in a losing summary judgment motion because the defendant had not moved for JMOL on the issue; however, in later decisions it has excused noncompliance with Rule 50 to review issues it labeled "legal." *See Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1318 (7th Cir. 1995) (reviewing applicability of *res judicata*, even though defense was not preserved under Rule 50, because it was presented in a pre-trial motion for summary judgment); *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 719-20 (7th Cir. 2003) (finding "no bar to reviewing [a] legal question," such as contract interpretation, "notwithstanding the party's failure to raise it in a motion for judgment as a matter of law at trial").

Likewise, in *Metropolitan Life Insurance Co. v. Golden Triangle*, 121 F.3d 351, 353, 356 (8th Cir. 1997), the Eighth Circuit refused to review whether the terms of a contract were ambiguous because defendant had "never renewed the argument it set forth in its summary judgment motion by moving for judgment as a matter of law either at the close of evidence or after the jury's verdict," and expressly rejecting the proposed dichotomy between "law" and "fact" questions because it "condones a litigation strategy that disregards the Federal Rules of Civil Procedure 50(a) and 50(b), and 28

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[12] The Eleventh Circuit has not expressly addressed the issue, but several other circuits have interpreted *Holley v. Northrop Worldwide Aircraft Services, Inc.*, 835 F.2d 1375, 1377-78 (11th Cir. 1988), as permitting appellate review of legal issues raised on summary judgment but not preserved under Rule 50. *See, e.g., Varghese*, 424 F.3d at 422-23; *Chesapeake*, 51 F.3d at 1235 n.8; *Black*, 22 F.3d at 571 n.5.

U.S.C. § 1292(b) (1994)." It later held that it may review an issue even when not preserved under Rule 50 "'when the material facts are not in dispute and the denial of summary judgment is based on the interpretation of a purely legal question,'" such as contract interpretation. *White Consol. Indus., Inc. v. McGill Mfg. Co.*, 165 F.3d 1185, 1190 (8th Cir. 1999) (quoting *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1521 (10th Cir. 1997), and citing *Rekhi*, 61 F.3d at 1318).

* * *

There is thus a mature and acknowledged conflict among the circuits on whether appellate courts may grant JMOL to a party who has lost a jury trial based on a "question of law" not properly preserved pursuant to Rule 50. As these cases illustrate, the issue arises frequently and the circuits (along with litigants and district courts) are sorely in need of this Court's guidance on the proper standard to apply to this important procedural issue. If this case had arisen in the First, Third, Fourth or Fifth Circuit, TVT would have prevailed. The Court should grant certiorari and reverse the judgment below.

II. AT THE VERY LEAST, THE COURT SHOULD SUMMARILY VACATE AND REMAND THIS CASE FOR FURTHER CONSIDERATION IN LIGHT OF *UNITHERM*

At the very least, the Court should grant certiorari, summarily vacate the decision below and remand this case in light of *Unitherm*, which was decided after the Second Circuit issued its ruling. The Second Circuit disregarded Rule 50 when it reviewed, vacated, and granted JMOL in favor of Respondents on the tortious interference and copyright claims.

This Court's decision in *Unitherm* emphasized not only that Rule 50 is to be strictly applied, but also that a failure to satisfy the requirements of Rule 50 strips the court of appeals of any authority to order the entry of judgment or to grant a new trial in favor of the appellant. 126 S. Ct. at

988. As discussed above, *Unitherm* reinforces this Court's prior pronouncements that strict compliance with Rule 50 is necessary to ensure that the constitutional right to jury trial in civil cases is protected. *See supra* at 16-17. *Unitherm* further emphasized that "'[a] post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.'" 126 S. Ct. at 984 n.1 (quoting Amendments, 134 F.R.D. at 687). The Second Circuit should be directed to reassess, in light of *Unitherm*, its willingness to review Respondents' "single contract" theory and grant JMOL on the tortious interference claim even though Respondents failed to raise it in their Rule 50(a) motion, and its decision to dismiss the copyright claim on grounds it raised *sua sponte*, which the jury never had an opportunity to consider.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted and the decision below reversed. Alternatively, the Court should grant the petition, summarily vacate the decision below, and remand it to the Second Circuit with instructions to reconsider its decision in light of *Unitherm*.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

TVT RECORDS, Plaintiff-Counter-Defendant-Appellee,
TVT Music, Inc., Plaintiff-Appellee,,

v.

THE ISLAND DEF JAM MUSIC GROUP, a division of UMG Recordings, Inc., Defendant-Counter-Claimant-Appellant,
Lyor COHEN, Defendant-Appellant,
Steven Gottlieb, Counter-Claimant.

Docket No. 03-9026(L), 03-9046(CON), 03-9122(CON), 03-9258(CON).

Argued: Aug. 10, 2004.
Decided: June 14, 2005.

Before: JACOBS, B.D. PARKER, and HALL, Circuit Judges.

OPINION

B.D. PARKER, JR. Circuit Judge:

Island Def Jam Music Group ("IDJ") and Lyor Cohen, an IDJ principal, appeal from a judgment of the United States District Court for the Southern District of New York (Marrero, *J.*) in favor of TVT Records and TVT Music, Inc. (collectively "TVT"). Following a failed venture to produce and promote a series of recordings, TVT sued IDJ and Cohen on contract, tort and copyright claims. The jury awarded $25 million in compensatory and $107 million in punitive damages, an amount the court remitted to a total of $54 million. Because we conclude that TVT's tortious interference and fraudulent concealment claims had no

legally sufficient evidentiary basis and that, as a matter of law, TVT was not entitled to assert a copyright claim, we reverse the judgment and set aside the awards on these grounds. Because we also conclude that punitive damages were not recoverable for the breach of contract proved at trial, we reverse that award as well.

Background

This litigation arose from a contractual dispute between IDJ and TVT over the right to produce and market recorded music performances by a group known as Cash Money Click ("CMC"). Except as noted, the facts are undisputed. IDJ and TVT are both major players in the recording industry. TVT, founded in 1985, is the nation's largest independent record label. It produces and distributes the works of a number of highly successful hip-hop artists. IDJ is a division of Universal Music Group Recordings, Inc., the world's largest record company.

Irving Lorenzo of IDJ, known professionally as Irv Gotti, is one of the industry's most successful hip-hop producers. He began his career as a talent scout at TVT in the early 1990s and a few years later recruited CMC to TVT. CMC's members were Christopher Bristole, Otha Miller and Jeffrey Atkins, professionally known as Ja Rule. All were relatively obscure at that time. CMC subsequently signed an exclusive recording contract with TVT in 1994 (the "1994 Agreement"). The group recorded a number of songs, most of which were not released, and no albums incorporating the songs were produced. In 1996, Gotti left TVT and joined IDJ.

Ja Rule was released from his contractual obligations to TVT in 1994 and eventually followed Gotti to IDJ, signing an exclusive recording contract in 1998. Although TVT retained no rights to any of Ja Rule's new recordings after 1994, it still owned the rights to old CMC masters that had been made while Ja Rule was under contract to TVT.

Ja Rule's relationship with IDJ was highly successful, and he evolved into one of the recording industry's major stars. Gotti's career also flourished at IDJ. Serving as

producer, co-producer, or executive producer, he released a series of enormously successful albums for numerous major hip-hop artists such as Jay Z, Ja Rule and DMX. In 1999, Gotti entered a joint venture with IDJ to form a record label, Murder, Inc., through which Gotti would produce records by various artists, including Ja Rule.

In early 2001, despite Ja Rule and Gotti's exclusive recording contract with IDJ, TVT approached Ja Rule and Gotti about reuniting CMC for a new album. Although Lyor Cohen, IDJ's chairman, was reluctant to give IDJ's consent to a new CMC album produced by TVT, he found himself in an awkward predicament. He felt the need to accommodate Ja Rule and Gotti, who were in the midst of renegotiating both the Murder, Inc. joint venture agreement and the terms of Ja Rule's future recordings with IDJ. Cohen was concerned that a failure to accommodate Ja Rule's request to do the CMC project might, at this fragile time, impair IDJ's relationship with Gotti and perhaps alienate Ja Rule. The discussions culminated in a Heads of Agreement ("HOA") signed by TVT, Ja Rule and Gotti—both on his own behalf and on behalf of Murder, Inc. The HOA called on Gotti to produce a CMC album containing eight new songs and four re-mixes of CMC's earlier, never-released recordings. The HOA further provided that TVT would receive fifty percent of the profits from the new venture and would own the copyrights to all the masters. However, since IDJ had exclusive contracts with Ja Rule and Gotti, the agreement was subject to IDJ's consent and the HOA itself appeared to contemplate IDJ's ultimate role in "sign[ing]-off on this [agreement] signifying its acceptance and agreement thereto."

IDJ contends that, as leverage to secure its consent, TVT threatened to release the old CMC masters to coincide with the release of IDJ's next Ja Rule album and that Ja Rule and Gotti were, in part, motivated to assist the careers of the two former, comparatively less successful, CMC members. Nevertheless, Gotti and Ja Rule warranted in the HOA that they had "the right, power and authority to enter

into and perform the [HOA's] terms and conditions," and "indemnifie[d] and h[e]ld[] TVT harmless of and from any claims by any third parties that TVT's exploitation of the Album ... infringe upon or violate the rights of any such party."

Negotiations commenced and resulted in a Side Letter Agreement ("SLA") dated September 2001 between IDJ and TVT, Gotti and Ja Rule. Under the SLA, IDJ agreed "to comply with and honor all of the terms and conditions set forth in the [HOA] (as same pertains to or affects [IDJ]) and to permit 'Ja Rule', Murderers Inc.[sic] and Irv Gotti to perform for [TVT] and grant to [TVT] the rights set forth in the [HOA]." The SLA also modified the profit distribution formula in the HOA. Instead of fifty percent, TVT would receive forty percent, Gotti, Ja Rule and Murder, Inc. would together receive thirty percent, and IDJ would receive thirty percent. The SLA was signed on behalf of IDJ by Jeffrey Kempler, senior vice president of business and legal affairs at IDJ, but was not returned to TVT. TVT's lawyer William Leibowitz, Esq. became concerned when he did not receive IDJ's executed copies of the SLA and, in November 2001, contacted IDJ's lawyers. They assured Leibowitz that the deal was final, but still did not forward executed copies to TVT. Later that month, Leibowitz took the precautionary step of writing IDJ to place it on notice that TVT was relying on IDJ's assurances regarding its commitment to the SLA and that TVT was proceeding on that basis. IDJ did not respond to the letter.

Sometime after execution of the HOA by Gotti and Ja Rule in October 2001, TVT, Ja Rule and Gotti began to perform obligations imposed by the HOA. The signing of the HOA triggered a $400,000 advance payment from TVT to Gotti and Ja Rule, and the artists began recording new CMC tracks and remixing old ones. In the spring of 2002, Gotti, Murder, Inc. and TVT developed promotional materials for the album, including a teaser DVD and CD featuring two of the remastered CMC tracks released by IDJ. In this regard, IDJ obtained oral and written licenses

for the songs "The Rain" and "Get Tha Fortune," respectively, from TVT. A release date was set for the fall of 2002.

TVT's theory, which it successfully pursued at trial, was that IDJ and Cohen never really intended to cooperate on the new TVT album and, in fact, intended to sabotage it. They initially consented to the CMC project in order to gain time to renegotiate an extension of Gotti's contract, which was expiring at the end of 2001. Because Cohen knew he could not alienate Gotti during this period, he accommodated Gotti and Ja Rule's desire to produce (at TVT's expense) a new CMC album. Once Gotti was re-signed in December 2001, IDJ proceeded, through a variety of steps, to kill the album. According to TVT, IDJ promised Gotti and Ja Rule that it would pay additional compensation if they could deliver the TVT-owned CMC masters to IDJ for release. IDJ, at the same time, moved up the release date for Ja Rule's next IDJ album from early 2003 to November 2002 to compete with, and presumably detract attention from, the new CMC album. To cap things off, in August 2002, IDJ finally responded to TVT's request of ten months earlier for the executed copy of the SLA by rejecting it, forbidding TVT from exploiting Ja Rule's services and informing TVT that it could not proceed with the release of the CMC album.

Faced with the prospect of losing the potentially valuable CMC album and having IDJ issue its own Ja Rule album that might include old CMC music, TVT sued IDJ, asserting a number of claims that have survived to this appeal. TVT claimed for breach of contract, contending that IDJ breached the SLA by repudiating it after agreeing to execute it and instructing Murder, Inc., Gotti and Ja Rule not to deliver the CMC album to TVT. It claimed that IDJ tortiously interfered with Ja Rule and Gotti's performance under the HOA and under CMC's 1994 Agreement with TVT when IDJ and Cohen caused Murder, Inc., Gotti and Ja Rule not to deliver the CMC album as required under the HOA. TVT also claimed that IDJ and Cohen fraudulently

induced other CMC members to violate the 1994 Agreement by engaging in unauthorized performances released by IDJ. TVT asserted a fraud claim based on allegedly false statements on behalf of IDJ at the behest of Cohen. The statements confirmed to TVT that IDJ agreed to TVT's production of the CMC Album pursuant to the SLA. Finally, TVT claimed for willful copyright infringement on the theory that IDJ and Cohen fraudulently obtained permission from TVT to use two CMC songs on the Summer 2002 teaser as a reciprocal courtesy for IDJ's agreeing to the CMC project.

Following a bifurcated trial, the jury found IDJ liable for breach of contract, in effect concluding that IDJ had entered into an oral contract embodying the SLA. The jury also found the defendants jointly and severally liable for tortious interference with the HOA, fraudulent concealment and copyright infringement. Subsequently, the jury assessed compensatory and punitive damages of approximately $132 million.

IDJ then moved under Rule 50(b) for judgment as a matter of law and under Rule 59 for a new trial or remittitur. Fed.R.Civ.P. 50(b), 59. IDJ succeeded only in obtaining a remittitur of a substantial amount of the punitive damages, thereby reducing the total judgment to approximately $54 million. Specifically, the court reduced the punitive damages awards against both IDJ and Cohen on the tortious interference claims from $50 million each to $25 million and $2 million, respectively, and against Cohen on the fraud-claims from $6 million to $1 million.[1] This

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[1] *See TVT Records v. Island Def Jam Music Group*, 279 F.Supp.2d 413, 461 (S.D.N.Y.2003) (granting IDJ's motion for remittitur). TVT elected to remit its award of punitive damages to these amounts, rather than accept a new trial, and subsequently applied for, and received, attorneys' fees under section 505 of the Copyright Act, 17 U.S.C. § 505. *See TVT Records v. Island Def Jam Music Group*, 288 F.Supp.2d 506, 512 (S.D.N.Y.2003) (granting attorneys' fees).

appeal ensued.[2]

Discussion

As their principal grounds for relief on appeal, IDJ and Cohen contend that the District Court erred in denying their post-trial motions on TVT's claims for tortious interference, fraudulent concealment and copyright infringement, and in permitting any punitive damages to survive the motion for remittitur. We review *de novo* the District Court's denial of a motion for judgment as a matter of law. *Bracey v. Bd. of Educ. of Bridgeport*, 368 F.3d 108, 113 (2d Cir.2004) (citation omitted) (RJC, RDS, Gibson). In so doing, "the question is always whether, after drawing all reasonable inferences in favor of the non-moving party and making all credibility assessments in [the non-movant's] favor, there is sufficient evidence to permit a rational juror to find in [the non-movant's] favor." *Id.* (citation omitted). We also review *de novo* questions of law such as the legal viability of TVT's copyright claim. *Cf. Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 107 (2d Cir.1998) (district court's rejection of a fair use defense to copyright infringement is subject to *de novo* review).

For the reasons set forth below, we conclude that TVT's claims for tortious interference and for fraudulent concealment fail for lack of a legally sufficient evidentiary basis. We also conclude that TVT is not entitled to assert a claim for copyright infringement without having rescinded the licenses on which its infringement claim is based. Accordingly, we reverse the finding of liability and set aside the damages awarded on those claims.[3] Finally, we set

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[2] The appeal is limited to liability on the tortious interference, fraudulent concealment, and copyright claims, as well as any punitive damages awarded on those claims and on the breach of contract claim. IDJ does not appeal the award to TVT of $126,720 as compensatory damages for breach of contract.

[3] As a result of our reversal of liability on the tortious interference and fraudulent concealment claims, we need not reach the issues raised by appellants regarding the damages awarded on those claims.

aside the award of punitive damages based on breach of the SLA because punitive damages are not recoverable for breach of contract where, as here, the wrongful conduct is not directed at the public at large.

A. *Tortious Interference*

Under New York law, a tortious interference claim requires a showing that a valid contract exists and that a third party with knowledge of the contract intentionally and improperly procured its breach. *Finley v. Giacobbe*, 79 F.3d 1285, 1294 (2d Cir.1996). An important qualification exists: One asserting a tortious interference claim must also show that the defendant was not a party to the contract with which he allegedly interfered. *Id.* at 1295; *accord Winicki v. City of Olean*, 203 A.D.2d 893, 611 N.Y.S.2d 379, 380 (4th Dep't 1994). For this reason, the viability of TVT's tortious interference claim depends on whether IDJ was a party or a stranger to the HOA.[4] IDJ claims that the SLA and the HOA were a single contract and that, because the jury implicitly found that an oral agreement embodying the SLA

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[4] We find TVT's perfunctory contention that appellants failed to preserve this argument on appeal to be without merit. To the contrary, we are satisfied that they raised it at a number of critical junctures during District Court proceedings. The argument was unambiguously raised in defendants' reply memorandum in further support of their summary judgment motion and in their pre-trial memorandum. They unsuccessfully requested a jury instruction to the effect that they could not be liable for tortious interference if the jury were to find that IDJ was a party to the HOA. The point was also made in their answer to the amended complaint and in the joint pre-trial order. We are not troubled by the fact that the defendants did not reiterate this claim in their Rule 50(a) motion because the court and the plaintiffs received multiple notices of, and a full opportunity to meet, the argument. Significantly, the District Court had already rejected the argument in its opinion denying summary judgment. *See TVT Records v. Island Def Jam Music Group*, 244 F.Supp.2d 263, 275 (S.D.N.Y.2003). Moreover, we also note that the District Court saw fit to dispose of the argument in its denial of the appellants' Rule 50(a) motion. *See TVT Records*, 2003 WL 1858151, at *4 (S.D.N.Y. Apr. 9, 2003). Defendants' obligation was to give clear notice, not to make pests of themselves.

had been created, IDJ was necessarily a party to the HOA. Consequently, IDJ could not have tortiously interfered with Gotti's and Ja Rule's performance under the HOA.[5] Blue Cohen 6; Blue IDJ 22.

TVT, on the other hand, contends that during pretrial proceedings the court below correctly identified the question of whether the HOA and the SLA were separate agreements as one of fact. TVT also contends that the jury was specifically instructed that it could not find defendants liable for tortious interference unless it found that the parties intended the HOA and the SLA to be separate contracts. Consequently, the jury's finding that IDJ and Cohen committed tortious interference was conclusive of whether the agreements were separate since it was sufficiently grounded in the evidence.

No one disputes that "[w]hether multiple writings should be construed as one agreement depends upon the intent of the parties," *Commander Oil Corp. v. Advance Food Serv. Equip.*, 991 F.2d 49, 52-53 (2d Cir.1993), an issue which is typically a question of fact for the jury, *Rudman v. Cowles Communications, Inc.*, 30 N.Y.2d 1, 13, 330 N.Y.S.2d 33, 280 N.E.2d 867 (1972). But if the documents in question reflect no ambiguity as to whether they should be read as a single contract, the question is a matter of law for the court. *See, e.g., Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 232 F.3d 153, 157-58 (2d Cir.2000). Under New York law, "all writings which form part of a single transaction and are designed to effectuate the same purpose [must] be read together, even though they were executed on

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[5] Appellants also argue that IDJ is not a stranger to the HOA because IDJ and Gotti were co-owners of Murder Inc. as equal partners. Under this theory, appellants contend that IDJ cannot be liable for tortious interference with the HOA because IDJ was a party to the contract by virtue of its fifty percent stake in Murder Inc. Since we conclude that IDJ was not a stranger to the agreement on the ground that the SLA and HOA must be read together as a single contract, we do not reach this argument.

different dates and were not all between the same parties." *This is Me, Inc. v. Taylor*, 157 F.3d 139, 143 (2d Cir.1998); *accord Nau v. Vulcan Rail & Constr. Co.*, 286 N.Y. 188, 197, 36 N.E.2d 106 (1941).

We think it is sufficiently clear that the HOA and SLA are one agreement and that there was nothing for the jury to decide. The HOA and the SLA were intended to effectuate the same result: the production and release of a CMC album containing older music owned by TVT and newer music to be recorded and produced by IDJ, Ja Rule and Gotti. IDJ was obligated under the SLA to "honor all of the terms and conditions set forth in the [HOA] (as same pertains to or affects you) and to permit 'Ja Rule', Murderers Inc. [sic] and Irv Gotti to perform for us and grant to us the rights set forth in the [HOA]." The HOA expressly contemplated IDJ's eventual participation in the project since Ja Rule and Gotti were to receive payments from TVT once IDJ "sign[ed]-off on this Heads of Agreement signifying its acceptance and agreement thereto." Moreover, the SLA modified the profit distribution formula in the HOA to provide significant payments directly to IDJ. Since the SLA is meaningless without the HOA, IDJ is a participant, not a stranger, and the "interference" that IDJ was found by the jury to have engaged in constituted nothing more than a breach of the SLA—and, by its terms, the HOA. *See Finley*, 79 F.3d at 1295; *Winicki*, 611 N.Y.S.2d at 380.

TVT contends that the HOA and the SLA are separate because the evidence established that the parties intended that they would be read separately, they were negotiated and signed at different times, memorialized in different documents and involved different parties. While these factors are pertinent to the "separate contracts" determination, they do not address the legally operative question: whether the contracts were part of a single transaction intended to effectuate the same purpose. *See This is Me. Inc.*, 157 F.3d at 143-46; *Gordon v. Vincent*

Youmans, Inc., 358 F.2d 261, 263 (2d Cir.1965). We believe they were.

TVT also contends that the HOA and SLA were separate contracts because they were not mutually dependent—that is, the breach of one did not undo obligations imposed by the other. *See Commander Oil Corp.*, 991 F.2d at 53 (inquiry is whether "the parties assented to all the promises as a whole, so that there would have been no bargain whatever if any promise or set of promises had been stricken") (quoting 6 *Williston on Contracts* § 863, at 279-80 (3d ed. W. Jaeger 1962)). We believe this argument is simply wrong. It is undisputed that the CMC project would not, and could not, have proceeded without IDJ's execution of the SLA (Gray Cohen 11); indeed, it was IDJ's breach that caused the demise of the project. Put another way, if IDJ's promises had been "stricken" from the SLA, there "would have been no bargain whatever." 6 *Williston on Contracts* § 863, at 279-80. It is of no moment that the HOA also contained certain obligations (e.g. the performers' obligation to indemnify TVT against claims arising from the CMC album) that were not affected by the SLA. The test is whether the documents were intended as a single agreement, not whether they imposed congruent obligations. The conclusion is inescapable that the SLA and HOA were meant to be read together as a single contract, and therefore IDJ was not a stranger to the agreement. Accordingly, we reverse the judgment for TVT on its tortious interference claim against IDJ and Cohen.

B. ***Fraudulent Concealment***

IDJ and Cohen also contend that the District Court erred in denying its motion for judgment as a matter of law with respect to TVT's fraudulent concealment claim (that IDJ failed to disclose that it never intended to perform its obligations under the SLA) because, under New York law, the failure to disclose an intention to breach is not actionable

as a fraudulent concealment. We agree.[6]

Under New York law, fraudulent concealment requires proof of: (1) failure to discharge a duty to disclose; (2) an intention to defraud, or scienter; (3) reliance; and (4) damages. *Brass v. Am. Film Tech., Inc.*, 987 F.2d 142, 152 (2d Cir.1993). In the context of a business transaction, the duty to disclose arises where a party, with a duty to be complete, has made only a partial or ambiguous statement, or "where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge." *Id.* at 150 (citation omitted), *accord Young v. Keith*, 112 A.D.2d 625, 492 N.Y.S.2d 489, 491 (3d Dep't 1985). However, the intention to breach does not give rise to a duty to disclose. Instead, the duty to disclose must exist separately from the duty to perform under the contract. *See Bridgestone/ Firestone v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 20 (2d Cir.1996) ("To maintain a claim of fraud in such a situation, a

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[6] As with the tortious interference issue, TVT contends that appellants waived this argument by not properly asserting it below in their Rule 50(a) motion. This contention is without merit. The District Court's finding of waiver notwithstanding, appellants argued, in their oral Rule 50(a) motion:

> The fraud claim is nothing more than an effort to get around the fact that there was no breach of contract. It's dressing up a breach of contract claim in an aggravated description of what went on here. They are trying to circumvent the law of contract and impose fraud liability when there is no contract.

Tr. of 3/17/02, at 1615 (emphasis added). In addition to arguing that there was no contract (which the jury did not credit), appellants also argued that TVT's fraud claim was duplicative of its contract claim, which subsumes the question of whether they had a duty to disclose their intention to breach the SLA.

Apparently, it was also clear to the District Court, which, in ruling on appellants' Rule 50(b) motion, disposed of the argument by reference to its earlier denial of summary judgment with no mention of waiver (while finding other of appellants' arguments that were not raised in the Rule 50(a) motion waived). *See TVT Records v. Island Def Jam Music Gp.*, 279 F.Supp.2d 366, 378, 380 (S.D.N.Y.2003).

plaintiff must either: (i) demonstrate a legal duty separate from the duty to perform under the contract; or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages.") (internal citations omitted); *Caniglia v. Chicago Tribune-N.Y. News Syndicate, Inc.*, 204 A.D.2d 233, 612 N.Y.S.2d 146, 147 (1st Dep't 1994) ("[A] cause of action for fraud does not arise, where ... the only fraud alleged merely relates to a contracting party's alleged intent to breach a contractual obligation.").

Here, TVT alleged—and presented evidence at trial—that during the course of the parties' relationship, IDJ and Cohen not only planned to breach the SLA by revoking the waiver of Gotti's and Ja Rule's exclusivity, but also planned to, and did, use the existence of the SLA to achieve at least two collateral aims: (1) to help lure Gotti into re-signing with IDJ; and (2) to lure TVT and CMC into creating new masters which IDJ would then appropriate for itself. We have held that in a situation where a defendant fails to disclose an intention not to perform a promise in the future, one of the ways a plaintiff can maintain a fraud claim under New York law is by also demonstrating "a fraudulent misrepresentation collateral or extraneous to the contract." *Bridgestone/Firestone*, 98 F.3d at 20; *see also Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.*, 68 N.Y.2d 954, 510 N.Y.S.2d 88, 502 N.E.2d 1003 (1986) (refusing to dismiss fraud claim alleging "a misrepresentation of present fact, not of future intent" which misrepresentation was "collateral to, but which was the inducement for the contract" and thus not duplicative of contract claim) (citations and internal quotation marks omitted).

However, the non-disclosure of collateral aims, such as those alleged by TVT, do not constitute actionable "fraudulent misrepresentation[s] collateral or extraneous to the contract." *Bridgestone/Firestone*, 98 F.3d at 20. Although TVT alleged collateral aims, the aims proved at

trial were not distinct fraudulent misrepresentations but, rather, were allegations about defendants' states of minds used to support the contention that they intended to breach the contract (i.e. the motives for the breach). Thus, the fraudulent concealment claim is insufficiently distinct from the breach of contract claim to be viable. *See Contemporary Mission, Inc. v. Bonded Mailings, Inc.*, 671 F.2d 81, 85 (2d Cir.1982) (holding that "[i]f the only interest involved ... is holding a party to a promise, a plaintiff will not be permitted to transform the contract claim into one for tort."); *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 389-90, 521 N.Y.S.2d 653, 516 N.E.2d 190 (1987) (holding that causes of action sounding in negligence were properly dismissed where plaintiff has not alleged the violation of a legal duty independent of the contract because "[i]t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract.").[7]

TVT relies principally on *Brass* to support its contention that it proved a claim for fraudulent concealment, but *Brass* cannot bear this weight. In *Brass*, we held that where a

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[7] *See also Guterman v. RGA Accessories, Inc.*, 196 A.D.2d 785, 602 N.Y.S.2d 116, 117 (1st Dep't 1993) ("As the only fraud alleged relates to the breach of contract, the mere addition of allegations of scienter does not give rise to a cause of action seeking damages for fraud."); *Metropolitan Transp. Auth. v. Triumph Adver. Prod.*, 116 A.D.2d 526, 497 N.Y.S.2d 673, 675 (1st Dep't 1986) (dismissing fraud claim based on fraudulent misrepresentation collateral to the contract because "none of [plaintiff's] allegations [we]re distinct from those giving rise to the breach of contract claim and relate[d] to facts collateral and extraneous to the contract"). *Cf. Grappo v. Alitalia Linee Aeree Italiane, S.p.A.*, 56 F.3d 427, 434 (2d Cir.1995) (holding that plaintiff stated a fraud claim where he alleged that defendant engaged in fraud independent of the contract but acknowledging that "[a] cause of action for fraud does not generally lie where the plaintiff alleges only that the defendant entered into a contract with no intention of performing.").

securities broker failed to inform a buyer that securities offered for sale were encumbered, and where the broker knew that such information was unknown to the buyer and would likely have caused him not to purchase the securities, the seller could be liable for fraudulent concealment. *Brass*, 987 F.2d at 152. The issue in *Brass* was not that the seller never intended to perform the contract; on the contrary, the seller followed through with the sale and delivered the securities. The issue, instead, was that the seller concealed a material defect in the product it sold. *Id.* at 152. We analogized *Brass* to *Donovan v. Aeolian Co.*, 270 N.Y. 267, 200 N.E. 815 (1936), where the New York Court of Appeals held that a piano manufacturer fraudulently concealed a material fact when selling a used and rebuilt piano because the salesman was silent regarding the fact that the piano in the showroom was used and partially rebuilt, and the manner in which the instrument was displayed implied that it was new. *Brass*, 987 F.2d at 152 (citing *Donovan*, 270 N.Y. at 270-71, 200 N.E. 815).

Here, IDJ did not conceal any information that, if known by TVT, would have made its obligations under the SLA less valuable to TVT. It simply failed to perform. As a result, contract damages are available to TVT, but not tort damages sounding in fraud. Accordingly, TVT's claim for fraudulent concealment fails.

C. ***Copyright Infringement***

Appellants argue that since TVT's fraudulent concealment claim was duplicative of its breach of contract claim, and was otherwise the only fraud-related theory accepted by the jury, there was no legal basis for the jury's finding that IDJ infringed TVT's copyrights in "The Rain" and "Get Tha Fortune" by fraudulently obtaining licenses to, and later publishing, those works.[8]

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[8] We note that when the trial court denies a Rule 50 motion, both that denial and "errors of law in the trial court may be raised on appeal." 9A C. Wright & A. Miller, *Federal Practice & Procedure*, § 2540, at 373 (1995).

We agree that the copyright verdict and damages award cannot stand as a matter of law, but not for the reason advanced by IDJ and Cohen. Instead, we hold that the District Court mistakenly concluded that "[a] fraudulently induced copyright license is invalid" *ipso facto*. *TVT Records*, 244 F.Supp.2d at 269 (summary judgment motion) (cited in *TVT Records*, 279 F.Supp.2d at 381 (Rule 50(b) motion)). This conclusion overlooks the fact that the license must formally be rescinded before an infringement action based on fraudulent inducement of a copyright license can proceed. *See Graham v. James*, 144 F.3d 229, 237-38 (2d Cir.1998) ("A material breach of a covenant will allow the licensor to rescind the license and hold the licensee liable for infringement for uses of the work thereafter," but "rescission [does] not occur automatically ...."); *see also, Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749, 753 (11th Cir.1997) ("One party's breach [of an oral, nonexclusive license to play a song] does not automatically cause recision of a bilateral contract"); *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 586 (9th Cir.1993) ("Although licensing agreements are not terminable at will, under federal and state law a material breach of a licensing agreement gives rise to a right of rescission which allows the nonbreaching party to terminate the agreement. After the agreement is terminated, any further distribution would constitute copyright infringement.") (internal citations omitted); 3 *Nimmer on Copyright* § 10.15 [A] (6th ed. 1978) ("Rescission may also be based on fraud in the inducement to execute the assignment," but "[f]ailing such rescission, ... the grant continues in place, thus precluding infringement liability until such time as the copyright owner exercises his entitlement to rescind.").

TVT has neither sued for rescission of the licenses nor alleged the breach of any covenant related to their grant. Accordingly, it cannot now recover for copyright infringement. Therefore, we reverse the judgment of liability and set aside the damages award and the attorneys'

fees on TVT's copyright infringement claim. *See* 17 U.S.C. § 505.

D. *Punitive Damages.*

Finally, IDJ has appealed the punitive damages awarded on TVT's breach of contract claim,[9] on the ground that New York law only permits such an award when a defendant's conduct is "part of a pattern directed at the public generally," a requirement not satisfied in this case.[10] *New York Marine & Gen. Ins. Co. v. Tradeline (L.L.C.)*, 266 F.3d 112, 130 (2d Cir.2001) (quoting *New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 316, 639 N.Y.S.2d 283, 662 N.E.2d 763 (1995)). The District Court acknowledged the existence and vitality of this rule, but discerned a "narrow exception" from two Appellate Division cases. *TVT Records*, 262 F.Supp.2d at 195-96 (discussing *Aero Garage Corp. v. Hirschfeld*, 185 A.D.2d 775, 586 N.Y.S.2d 611 (1st Dep't 1992), and *Williamson, Picket, Gross, Inc. v. Hirschfeld*, 92 A.D.2d 289, 460 N.Y.S.2d 36 (1983) (1st Dep't 1983)). It concluded that punitive damages might be available on a contract claim, absent conduct directed at the public,

> where the plaintiff establishes a sufficiently high degree of bad faith by the defendant evincing disingenuous or dishonest failure to carry out contractual obligations, thus frustrating the

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[9] IDJ has also appealed from the punitive awards on TVT's tortious interference and fraudulent concealment claims, but our reversal on those claims renders those damages issues moot.

[10] New York law also requires that the defendant's conduct be (1) "actionable as an independent tort; (2) ... of [an] egregious nature; [and] (3) ... directed to plaintiff," before punitive damages for breach of contract can be awarded. *New York Marine*, 266 F.3d at 130. Apart from the fact that appellants' conduct was not aimed at the general public, our dismissal of TVT's tort claims necessarily means that appellants' conduct was not "actionable as an independent tort." This additional reason also warrants setting aside the award of punitive damages on TVT's contract claim. *See Canelle v. Russian Tea Room Realty LLC*, 2002 WL 287750 (S.D.N.Y. Feb. 27, 2002), 2002 U.S. Dist. LEXIS 3169, at *24.

> plaintiff's rights to an aggravated extent, particularly where bad faith is apparent at or near the outset of the transaction and where the breached obligations are unambiguous.

Id. at 196.

We are not persuaded that this exception is sound. For one thing, neither the *Aero Garage* court nor the *Williamson* court characterized what it was doing as carving out an exception to the general public aim requirement. Both cases relied on an earlier Court of Appeals case that approved punitive damages for a "bad faith" breach of contract, without purporting to craft an exception to, or even discussing, the public aim requirement. *See Aero Garage*, 586 N.Y.S.2d at 613 (citing *Gordon v. Nationwide Mut. Ins. Co.*, 30 N.Y.2d 427, 437, 334 N.Y.S.2d 601, 285 N.E.2d 849 (1972)); *Williamson*, 460 N.Y.S.2d at 41 (same).[11] In other words, *Aero Garage* and *Williamson* were decided at a time when New York law was at best ambiguous as to whether conduct directed at the general public was necessary to recover for breach of contract. *Compare Gordon*, 30 N.Y.2d at 437, 334 N.Y.S.2d 601, 285 N.E.2d 849 (noting that "[t]he punitive nature of damage for the bad faith breach of contract is a characteristic of the law of contracts generally," without mentioning any public aim requirement), *with Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 358, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976) ("It has always been held that punitive damages are not available for mere breach of contract, for in such a case only a private wrong, and not a public right, is involved.").

The problem for TVT's theory is that two more recent New York Court of Appeals cases call into question the continued validity of the rule in *Gordon*, as applied in *Aero Garage* and *Williamson*. In *Rocanova v. Equitable Life*

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[11] *Gordon* held that in order to trigger punitive damages, "bad faith require[d] an extraordinary showing of a disingenuous or dishonest failure [by the defendant] to carry out a contract." *Gordon*, 30 N.Y.2d at 437, 334 N.Y.S.2d 601, 285 N.E.2d 849.

Assurance Society of the United States, 83 N.Y.2d 603, 612 N.Y.S.2d 339, 634 N.E.2d 940 (1994), the Court of Appeals, after reviewing this precedent, concluded that "[p]unitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights," but that such damages were recoverable when the breach also involved a particularly egregious fraud that "was aimed at the public generally." *Id.* at 613, 612 N.Y.S.2d 339, 634 N.E.2d 940 (internal quotation marks omitted). In *New York University v. Continental Insurance Co.*, 87 N.Y.2d 308, 639 N.Y.S.2d 283, 662 N.E.2d 763 (1995), decided the following year, the Court of Appeals made it even more clear that punitive damages were recoverable in a contract action only "if necessary to vindicate a public right." *Id.* at 315, 639 N.Y.S.2d 283, 662 N.E.2d 763 (citing *Rocanova*, 83 N.Y.2d at 613, 612 N.Y.S.2d 339, 634 N.E.2d 940). This rule has not been changed by the Court of Appeals, and we have no reason to question its continued vitality.[12]

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[12] The contrary decisions of a handful of district courts within this Circuit, e.g., *Bonnie & Co. Fashions v. Bankers Trust Co.*, 945 F.Supp. 693, 711 (S.D.N.Y.1996), as well as a single Appellate Division panel, *see Suffolk Sports Ctr. Inc. v. Belli Constr. Corp.*, 212 A.D.2d 241, 628 N.Y.S.2d 952, 955-56 (2d Dep't 1995), do not provide such a reason. In *Bonnie*, the court cites *New York University*, but misreads it to require egregious conduct *or* conduct aimed at the public before punitive damages can be assessed. 945 F.Supp. at 711. In *Suffolk Sports Center*, the court cites *Rocanova*'s "public aim" requirement, but concludes nevertheless that defendant's actions against a private entity "were sufficiently reprehensible so as to warrant the imposition of punitive damages against it." 628 N.Y.S.2d at 955-56.

First, the other post-*Rocanova* Appellate Division panels to consider the question have uniformly applied its public aim precondition to the award of punitive damages. *See Colton, Hartnick, Yamin & Sheresky v. Feinberg*, 227 A.D.2d 233, 642 N.Y.S.2d 283, 284 (1st Dep't 1996) ("Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights.") (internal citation and quotation marks omitted); *Bibeau v. Ward*, 228 A.D.2d 943, 645 N.Y.S.2d 107, 110 (3d Dep't 1996) ("Punitive damages [in contract claims] ... are limited to those instances where it is necessary

We do not believe that IDJ's conduct in breaching the SLA was aimed at the public generally. The District Court held that even if the public aim requirement applied, IDJ's hurried and haphazard attempt to deliver the CMC Album materials to TVT on the eve of trial "implicate[d] the judicial process," and therefore could be construed as "being directed at the public generally." *TVT Records*, 262 F.Supp.2d at 197. In addition, it held that IDJ's breach had an impact upon the public because it "impaired the creation and dissemination of a work of art that TVT intended to sell to the general public and which it had already advertised to the public at large." *Id.*

These incidental effects of IDJ's conduct do not constitute conduct directed at the public generally. When the Court of Appeals articulated the public aim requirement in *Rocanova* and more recently in *New York University*, it invoked an earlier distinction between "a gross and wanton fraud upon the public" and "an isolated transaction incident to an otherwise legitimate business." *Walker v. Sheldon*, 10 N.Y.2d 401, 406, 223 N.Y.S.2d 488, 179 N.E.2d 497 (1961). The latter, it implied, would not constitute conduct aimed at the public generally. *Id.* The conduct involved in this

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to vindicate a public right.") (internal citation and quotation marks omitted); *Murray-Gardner Mgmt. Inc. v. Iroquois Gas Transmission Sys. L.P.*, 229 A.D.2d 852, 646 N.Y.S.2d 418, 420 (3d Dep't 1996) ("[P]laintiff's request for punitive damages was properly dismissed in the absence of a showing by plaintiff that defendant engaged in egregious tortious conduct toward it that was part of a pattern directed at the public generally.").

Second, this Court has not wavered in applying the public aim requirement since *Rocanova* was issued. *See New York Marine*, 266 F.3d at 130 (claim for punitive damages in contract actions failed because plaintiff did not allege that defendant's conduct was directed at the public); *United States v. Merritt Meridian Constr. Corp.*, 95 F.3d 153, 160 (2d Cir.1996) (punitive damages recoverable in contract action "if the conduct was aimed at the public generally"). *Cf. New Spectrum Realty Servs., Inc. v. Nature Co.*, 42 F.3d 773, 777 (2d Cir.1994) (declining to award punitive damages, but recognizing that New York's Appellate Division has awarded punitive damages for willful frustration of a plaintiff's rights under an unambiguous contract) (citing *Aero Garage Corp. v. Hirschfeld*, 185 A.D.2d 775, 586 N.Y.S.2d 611 (1st Dep't 1992)).

case—IDJ's scuttling of the CMC project by breaching its obligations under the SLA—hewed more to the "isolated transaction incident to an otherwise legitimate business" than to the "gross and wanton fraud upon the public" required by *Walker*.

Our decision in *Merritt* confirms this view. 95 F.3d at 161. There we held that a defense contractor's failure to pay a sub-contractor for work for which the contractor had been paid by the Army Corps of Engineers, as well as its fraud in securing a promissory note and confession of judgment from the sub-contractor, did not "evince[] a pattern of conduct harming the general public." *Id.* We were not persuaded that conduct which could be characterized as defrauding the taxpayers and manipulating the judicial process had a sufficiently public component to support punitive damages. We reach a similar result here and set aside the award of punitive damages based on TVT's breach of contract. IDJ has not appealed the breach of contract award and remains liable for the $126,720 in compensatory damages awarded on that claim.

Conclusion

We reverse the judgment and set aside the award of damages, as well as attorneys' fees, on TVT's tortious interference, fraudulent concealment and copyright infringement claims. We also set aside the jury's award of punitive damages on TVT's breach of contract claim. We remand to the District Court with instructions to enter judgment in conformity with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

TVT RECORDS and TVT Music, Inc.,
Plaintiffs,

v.

The ISLAND DEF JAM MUSIC GROUP and Lyor Cohen,
Defendants.

No. 02 CIV.6644.

Feb. 13, 2003

DECISION AND AMENDED ORDER

MARRERO, District Judge.

On August 20, 2002, plaintiffs TVT Records and TVT Music, Inc. (collectively "TVT") commenced this action against defendants The Island Def Jam Music Group and its principal Lyor Cohen ("Cohen," and collectively "IDJ"), alleging copyright infringement and related state law claims. In an earlier proceeding in this litigation, the Court, after an evidentiary hearing on September 23, 24, and 30, 2002, granted in part and denied in part TVT's motion for a preliminary injunction directing IDJ not to interfere with the delivery of certain recordings at issue here. IDJ now moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and, in the alternative, for partial summary judgment under Rule 56 and for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. In an Order dated February 4, 2003 this Court granted in part and denied in part IDJ's motion and indicated that its findings, conclusions, and reasoning would be detailed in a subsequent decision. Accordingly, the Order

of February 4, 2003 is amended to incorporate the discussion set forth below.

I. *BACKGROUND*

This case arises from a licensing dispute between TVT and its principal Steve Gottlieb ("Gottlieb") and IDJ concerning the distribution and exploitation of musical works created by Jeffrey Atkins, who is professionally known as Ja Rule ("Ja Rule"), and Irving Lorenzo, who is professionally known as Irv Gotti ("Gotti," and together with Ja Rule, the "Artists").[1] Under an agreement dated March 2, 1998 (the "Ja Rule Agreement") between IDJ's predecessor-in-interest, Rush Associated Recordings, and Ja Rule, IDJ is entitled to Ja Rule's exclusive services as a recording artist. Pursuant to an agreement dated February 11, 1999, which was extended by agreement dated December 17, 2001 between IDJ's predecessor-in-interest, Island/Mercury Records, and Gotti, IDJ is entitled to Gotti's services as a record producer and talent-finder.

In an agreement entitled "Heads of Agreement Between Murderers Inc./Irv Gotti And Jeffrey Atkins (p/k/a 'Ja Rule') And Tee Vee Toons, Inc. ('TVT')" dated July 2, 2001 (the "Heads of Agreement"), TVT contracted with Ja Rule and Gotti to record, produce, and exploit an album (the "CMC Album") featuring the performances of Ja Rule, Christopher Bristole ("Bristole"), and Otha Miller ("Miller," and collectively the "CMC Artists").[2] Under the Heads of Agreement, four previously recorded CMC tracks would be

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[1] This factual recitation is derived primarily from the parties' respective statements submitted pursuant to Local Rule 56.1. Additional citations to the record appear as necessary.

[2] In 1994, Ja Rule, Bristole, and Miller performed together as a group known as Cash Money Click ("CMC") under contract with TVT. The group discontinued recording soon thereafter when Bristole was incarcerated. In 2001, after Bristol's release from prison, Ja Rule, allegedly in part to assist Miller's and Bristole's career development, opted to record a new album comprised of performances of these artists reunited again as CMC. Miller and Bristole had remained under contract with TVT.

reworked and supplemented with at least eight newly recorded tracks featuring the CMC Artists, including Ja Rule, to comprise the CMC Album. The Heads of Agreement, through various guarantees and indemnities, charges the Artists with securing any approvals, consents, and permissions necessary for them to satisfy their obligations under this contract.

The delivery date for the new recordings as contemplated by the written Heads of Agreement was November 1, 2001. This delivery date was later changed to reflect the schedules of the Artists and the timing of other contemplated album releases. TVT and the Artists ultimately agreed that the new tracks would be supplied to TVT in time for release in November 2002. In the interim, the Artists continued to work on the new recordings for the CMC Album, and by May 2002, approximately eleven new tracks had been recorded. In May 2002, Ja Rule and Gotti announced a forthcoming release of the CMC Album. In the summer of 2002, IDJ included a promotional card in a compilation disc produced by Gotti which announced the forthcoming release of the CMC Album. Also in the summer of that year, Universal Music Publishing Group, an affiliate of IDJ, announced on its internet site the CMC Album's forthcoming release.

TVT recognized that IDJ's assent to the project envisioned by the Heads of Agreement (the "CMC Project") was necessary, and it accordingly endeavored to negotiate for IDJ's consent in mid-to-late 2001. In the process, Cohen and Gottlieb outlined a profit sharing arrangement. In a letter dated October 22, 2001, William Leibowitz ("Leibowitz"), outside counsel for TVT, sent IDJ execution copies of what TVT understood to be the written embodiment of an agreement in which IDJ assented to the CMC Project, termed the Side Letter Agreement (the "Side Letter"), and asked that they be signed and returned. TVT maintains that IDJ agents repeatedly assured Leibowitz that IDJ assented to the CMC Project and that executed copies of the Side Letter would be supplied. In a letter

dated November 15, 2001, Leibowitz again asked IDJ to supply executed copies of the Side Letter, indicating that TVT had relied on representations of consent and assurances that executed copies would be forthcoming. In the spring of 2002, Leibowitz spoke with Brian Robinson of IDJ ("Robinson") about the Side Letter and IDJ's assurances, and Robinson indicated that he would inquire into the matter and then contact Leibowitz with an update. Executed copies of the Side Letter were never returned to TVT. Instead, in a letter from Robinson to Leibowitz dated August 14, 2002, IDJ informed TVT that IDJ was rejecting the agreement embodied in the Side Letter.

In or around June 2002, TVT granted IDJ's request for a license to use a musical composition and a TVT sound recording entitled "Get Tha Fortune" in a digital video disc entitled "Irv Gotti Presents: The Inc." TVT asserts that it relied on representations that IDJ had assented to the CMC Project, believing the publicity from IDJ's video disc would benefit the market performance of the CMC Album contemplated for release later that year. TVT granted IDJ permission to utilize this material prior to IDJ's written renunciation of the Side Letter.

II. *DISCUSSION*

A. *STANDARD OF REVIEW*

A motion for summary judgment should be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). *See Rodriguez v. Hahn*, 209 F.Supp.2d 344, 346 (S.D.N.Y.2002) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The role of the Court is not to resolve issues of fact but, rather, "to determine as a threshold matter whether there are genuine unresolved issues of material fact to be tried." *Gibson v. Am. Broad. Cos.*, 892 F.2d 1128, 1132 (2nd Cir.1989). The moving party

bears the initial burden of "informing the district court of the basis for its motion" and identifying the matters that "it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548. The nonmoving party "must support with specific evidence his assertion that a genuine dispute as to material fact does exist," *id.*, 477 U.S. at 324, 106 S.Ct. 2548, and "may not rely on conclusory allegations or unsubstantiated speculation," *Scotto v. Almenas*, 143 F.3d 105, 114 (2nd Cir.1998). The opposing party's showing of a genuine dispute must be grounded in concrete evidence sufficient to support a reasonable jury's rendering a verdict in his favor. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient."); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). All ambiguities and reasonable inferences drawn from the underlying facts must be resolved in the light most favorable to the party opposing the motion. *See United States v. One Tintoretto Painting Entitled "The Holy Family With Saint Catherine and Honored Donor"*, 691 F.2d 603, 606 (2nd Cir.1982) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)).

The standard for granting a Rule 12(c) motion for judgment on the pleadings is the same as that governing review of a Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted. In either case, the Court "must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor." *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2nd Cir.2001); *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2nd Cir.1998). Additionally, "[t]he court will not dismiss the case unless it is satisfied that the complaint cannot state any set of facts that would entitle [the plaintiff] to relief." *Patel*, 259 F.3d at 126; *see Valmonte v. Bane*, 18 F.3d 992, 998 (2nd Cir.1994). In the course of its

review, the Court may refer "to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. Am. Film Tech., Inc.*, 987 F.2d 142, 150 (2nd Cir.1993) (citation omitted); *see Bernstein/Glazer, LLC v. Babbitt*, No. 99 Civ. 1195, 2000 WL 322778, at *3 (S.D.N.Y. March 28, 2000).

B. *COPYRIGHT INFRINGEMENT*

TVT alleges copyright infringement in IDJ's use of "Get Tha Fortune," which TVT owned, in the "Irv Gotti Presents: The Inc." video. IDJ asserts in defense that it received a license from TVT for its use of this material. TVT responds that this license was fraudulently obtained by IDJ and therefore invalid. Gottlieb, TVT's principal, testified at the preliminary injunction hearing that TVT would not have granted IDJ this license in the absence of IDJ's representations of assent to the CMC Project and assurances that execution copies of the Side Letter would be produced. (Declaration of Pamela Gurley dated January 17, 2003 ("Gurley Decl."), Ex. A at 300-301, 313-314.)

A fraudulently induced copyright license is invalid. *See, e.g., Topps Chewing Gum, Inc. v. Imperial Toy Corp.*, 686 F.Supp. 402, 406 (E.D.N.Y.1988). Fraudulent inducement under New York law requires that TVT establish, among other things, that TVT actually relied on representations by IDJ and that such reliance was reasonable. *See Turtur v. Rothschild Registry Int'l, Inc.*, 26 F.3d 304, 310 (2nd Cir.1994); *Computerized Radiological Servs. v. Syntex Corp.*, 786 F.2d 72, 76 (2nd Cir.1986). IDJ argues that the record presents no disputed issue of material fact as to these two elements, and that the evidence compels the Court to reject TVT's asserted invalidity of IDJ's license. The Court disagrees.

1. *Reliance On The Asserted Representations*

Assuming for purposes of argument that IDJ in fact did make certain representations amounting to assent to the CMC Project, IDJ argues that the evidence compels a finding that TVT did not rely on any such representations when it granted IDJ permission to use "Get Tha Fortune." IDJ points to testimony by Leibowitz who stated that when structuring the terms of the Heads of Agreement, he included certain strong guarantees and indemnification clauses that imposed on the Artists the obligation to secure any necessary permissions and approvals. (Declaration of Robert J. Eddington dated November 18, 2002 ("Eddington Decl."), Ex. I at 56-57.) IDJ argues that because the onus was on Ja Rule and Gotti to obtain any necessary permissions and produce the musical works, TVT's decision to license "Get Tha Fortune" did not depend on assurances by IDJ that it consented to the CMC Project.

While the Artists may have been responsible to TVT for any losses of investment if the CMC Project were it to fail, such indemnification is clearly not the reason TVT entered into the Heads of Agreement. Rather, TVT's goal was to distribute and exploit the CMC Album; any indemnification owed to TVT by the Artists is quite obviously a fallback safety provision. Accordingly, assuming representations and assurances amounting to IDJ's assent were made, a reasonable jury could conclude that TVT relied on them in pursuit of this superior result, namely, the exploitation of the CMC Album.

Furthermore, TVT asserts a second benefit arising from these assurances that induced it to grant IDJ the license: publicity. Bryan Leach ("Leach"), a TVT executive, testified at the preliminary injunction hearing on this matter that the summer release of IDJ's video would help to prepare and excite the market for a November release of the CMC Album. (Gurley Decl., Ex. A at 38.) Assuming the representations and assurances asserted by TVT actually occurred, and that the CMC Album was to have been distributed and exploited by TVT, then this marginal

increase in market performance also would have benefitted TVT.

In light of these added potential benefits, the Court concludes that IDJ's argument, that the obligations imposed upon the Artists by certain indemnification and guarantee provisions of the Heads of Agreement preclude a finding that TVT relied on the asserted representations and assurances by IDJ, must be rejected.

2. ***Reasonableness of TVT's Reliance***

Turning to the question of the reasonableness, IDJ relies on the Second Circuit's decision in *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 265 (2nd Cir.1984), to argue that, even assuming IDJ made the representations and gave the assurances TVT claims, the impending written memorialization of this putative arrangement in the form of the Side Letter precludes, as a matter of law, a finding that an oral agreement was made in advance. IDJ's argument misconstrues the law.

In *Reprosystem*, the Second Circuit began its pertinent analysis by referencing the well-settled tenet of New York contract law holding that "the mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event .... These rules, placing the emphasis on intention rather than form, are sensible and reasonable." *Reprosystem*, 727 F.2d at 261 (quoting *V'Soske v. Barwick*, 404 F.2d 495, 499 (2nd Cir.1968)). The Second Circuit then reversed the district court's finding of an agreement in the absence of executed final drafts of the parties' contract. In so doing, however, the Second Circuit made it plainly clear that it did so because "a mistake was made by the district court ... because the documents and testimony clearly showed that the *intent of both parties was not to be bound prior to the execution of a formal, written contract.*" *Id.* at 261-62 (emphasis added). Propounding on its application of this doctrine, the Second Circuit, in an opinion issued nine months later, explained:

> In finding that no contract for the sale in fact existed, the *Reprosystem* court reaffirmed the principles enunciated in *V'Soske*, *see* 727 F.2d at 261, and ... did not undermine them. Far from elevating contract formalism over the parties' intent, the court relied on specific evidence that the parties intended not to be bound before execution of a formal contract. *Id.*, at 261-61. Here, both sides apparently agree that the mere fact that they contemplated memorializing their agreement in a formal document does not, without more, prevent the agreement from binding them in the interim. *Reprosystem* is thus inapposite.

Washington Heights-West Harlem-Inwood Mental Health Council, Inc. v. Dist. 1199, Nat'l Union of Hosp. and Health Care Employees, RWDSU, AFL-CIO, 748 F.2d 105, 107 (2nd Cir.1984).

IDJ has offered no evidence that compels the conclusion that IDJ and TVT agreed not to be bound until written contracts were executed. IDJ references language in letters sent to IDJ by Leibowitz that IDJ interprets as evidence of preconditions to final written approval, but the Court's reading of this language yields another possibility, namely, that Leibowitz was simply discussing logistics concerning the implementation and memorialization of a previously arranged agreement. For example, perhaps the most compelling passage referenced by IDJ in support of its proposition that any acceptance was conditioned on a final, executed, written contract, reads:

> As you know, for some weeks now, I have been awaiting from you copies of the agreement pertaining to [the CMC Album project]. ... It would be most appreciated if you would take the time to get these copies back to me *so that I can close this matter out and not have to continue to follow-up.* ... I look forward to receiving the copies *this week* so that we can be finished.

(Memorandum Of Law In Support Of Motion For (1) Summary Judgment On The Copyright Infringement Claim And Dismissal Of The State Law Claims For Lack Of Subject Matter Jurisdiction Or, In The Alternative, (2) Partial Summary Judgment And Judgment On The Pleadings On Certain Of The State Law Claims dated December 20, 2002 ("IDJ Br.") at 9 (quoting Eddington Decl., Ex. M) (former emphasis added; latter emphasis in original)). This excerpt appears in a letter dated November 15, 2001, and, according to TVT, was sent after a period of several months during which not only did TVT reach an oral agreement with IDJ but also during which it received repeated assurances that a formal, written version of what the parties had arranged would be forthcoming. (Gurley Decl., Ex. A at 189-91, 298; *id.*, Ex. B at 70.) This letter also was sent following at least one other written request of its kind from Leibowitz to IDJ dated October 22, 2001. (Eddington Decl., Ex. L.) With this backdrop, the highlighted language can reasonably be interpreted as Leibowitz's efforts to tie up a loose end in the otherwise completed arrangement; the term, "close out," does not necessarily mean the written contract was a condition to the parties' agreement as IDJ suggests. The question of agreement being conditioned on the execution of a formal, written contract is therefore a disputed issue of fact about which reasonable people may differ, and thus a question for a jury to resolve.

IDJ also references a telephone call between Robinson and Leibowitz that took place during the spring of 2002 in which Leibowitz again attempted to followup on the execution copies of the Side Letter and during which he asked Robinson, "What ever happened to my signed document?" (IDJ Br. at 10; Eddington Decl., Ex. A at 194-95.) IDJ interprets this question as evidence that TVT, through Leibowitz, "was fully aware that IDJ was not going to honor its alleged assurance that it would return a signed copy of the Side Letter" [before TVT granted IDJ a license

for "Get Tha Fortune."][3] (IDJ Br. at 10.) With this knowledge, the argument goes, reliance on TVT's claimed representations and assurances by IDJ was unreasonable.

While Leibowitz's question speaks to the return of the written Side Letter in executed form, it does not speak, one way or another, to the dispute over whether the Side Letter itself was simply a written memorialization of an otherwise existing oral agreement or whether the Side Letter's execution was a precondition to any such agreement. Additionally, to the extent that IDJ attempts to deduce the states of mind of TVT principals from Leibowitz's question, the Court notes that TVT prior to this telephone call had expended various forms of resources in furtherance of the CMC Project, including recording and studio expenses in January, March, and May 2002. (Gurley Decl., Ex. A at 38; *id.*, Ex. D, F, G.) Leach testified that at this time, the production of the CMC Album was underway because TVT believed that IDJ had assented to the CMC Project. (Gurley Decl., Ex. A at 38.) These activities and expenditures may permit a jury to conclude that TVT reasonably believed in the existence of a valid oral agreement. IDJ's argument that TVT's reliance was unreasonable because TVT knew IDJ would not honor any claimed assurances or representations must therefore be rejected.

IDJ references other aspects of the events surrounding this protracted series of transactions as evidence compelling a conclusion that TVT's alleged reliance was unreasonable. In this vein, IDJ asserts that the negotiations surrounding the Side Letter and the "Get Tha Fortune" license were distinct, that they were separated by several months, and that the bulk of the assurances and representations TVT alleges occurred prior to November 15, 2001. Each of these details, while arguably tending to lend some support to IDJ's argument that TVT's reliance was unreasonable,

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[3] This telephone call occurred before TVT granted IDJ permission to use "Get Tha Fortune."

cannot be viewed as so persuasive as to compel a conclusion as a matter of law that no genuine issue of disputed fact exists in light of the evidence concerning the progress of the CMC Project discussed in the preceding paragraph.

For these reasons, the Court concludes that on this record there exist disputed issues of fact concerning TVT's reliance and reasonableness. A jury must resolve these issues as it considers IDJ's defense of its having obtained TVT's permission against TVT's allegation of copyright infringement in regards to "Get the Fortune," a defense that cannot be sustained if TVT's permission in fact was fraudulently procured.

C. *TORTIOUS INTERFERENCE WITH CONTRACT*

IDJ next challenges TVT's tortious interference with contract claim and raises three arguments. First, IDJ argues that any breach of the Heads of Agreement occurred on November 1, 2001 when the Artists failed to deliver material for the CMC Album for reasons TVT references as the Artists' "busy schedules." IDJ argues that because the breach occurred in November 2001, any subsequent interference alleged by TVT cannot form the basis for tortious interference. Second, IDJ argues that any interference was justified by IDJ's superior economic interest. Third, IDJ claims that it (IDJ) was a party to the Heads of Agreement and cannot, therefore, be liable for allegedly interfering with its own contract. The Court addresses these arguments in turn.

1. *Timing Of The Breach*

To state a claim for tortious interference under New York law, a plaintiff must establish the following elements: (1) the plaintiff was a party to a valid contract; (2) the defendant knew of this contract; (3) the defendant improperly and intentionally procured a breach of this contract; and (4) the plaintiff suffered damages as a result of the breach. *See, e.g., Albert v. Loksen*, 239 F.3d 256, 274 (2nd Cir.2001); *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97, 99 (1956). IDJ's first argument

challenges TVT's evidence regarding the third element. This argument, however, overlooks TVT's claim that, while the Heads of Agreement originally contemplated a November 2001 delivery date, the parties did not treat this missed delivery date as a breach and, instead, agreed to modify this delivery term of the Heads of Agreement to accommodate the schedules of Ja Rule and Gotti. (Gurley Decl., Ex. A at 346.) In support, TVT points to the fact that the Artists continued to record tracks well after November 2001, that TVT paid for the expenses incurred during these recording sessions, and that TVT and Gotti agreed in May of 2002 on a delivery date in time for a November 2002 release of the CMC Album. (Gurley Decl., Ex. D, F, G, and M; *id.*, Ex. A at 346-50.)

Additional evidence supports TVT's assertion. For example, an insert announcement circulated within the Irv Gotti compilation disc, distributed by IDJ in the summer of 2002, promotes a November 2002 release date for the CMC Album, (Gurley Decl., Ex. I at 3), and the Universal Music Group's website announced a November 2002 release as well, (Gurley Decl., Ex. K). The record also indicates that Ja Rule announced the upcoming release of a CMC Album during an interview with MTV News in May 2002. (Gurley Decl., Ex. E.) Also in May 2002, the Artists took part in a photo shoot, paid for by TVT, to promote the CMC Album. (Gurley Decl., Ex. H.) Furthermore, TVT cites to language in paragraph B.4 of the Ja Rule / Recording Agreement Amendment dated August 5, 2002 as evidence that IDJ believed and knew as of August 2002 that TVT and the Artists were proceeding with the CMC Project.[4] (Gurley

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[4] This evidence may allow a reasonable jury to conclude that IDJ knew of the continuation of the Heads of Agreement, as required for TVT to maintain a tortious interference claim. IDJ argues that, in addition to knowledge of the continuation of the Heads of Agreement, TVT must show that IDJ consented to the new release date, arguing that TVT's tortious interference claim must be dismissed because TVT has neither alleged as much nor offered any evidence to that effect. IDJ's argument fails, however, because IDJ does not explain why, beyond its assent to the

Decl., Ex. N; *see also* Eddington Decl., Ex. D, ¶ 18.) This evidence is more than adequate to refute IDJ's claim, that no interference is possible with a contract that has already been breached, because a jury could reasonably find that it supports TVT's contention that the Heads of Agreement in fact remained in effect beyond November 2001. It renders the matter a genuine issue of disputed fact.

2. ***Economic Justification***

IDJ next argus that, assuming it did interfere with TVT's contract, any such interference was justified by its superior economic interest in the marketability of the Artists. TVT acknowledges the economic justification defense under New York Law, (Plaintiffs' Memorandum In Opposition To Defendants' (1) Motion For Summary Judgment On Plaintiffs' Copyright Infringement Claim And Dismissal Of The State Law Claims For Lack Of Subject Matter Jurisdiction Or, In The Alternative, (2) Partial Summary Judgment And Judgment On The Pleadings Of The State Law Claims dated January 17, 2003 ("TVT Br.") at 12), but argues that this defense is unavailable to IDJ because IDJ acted fraudulently in the circumstances surrounding the breach of the Heads of Agreement. TVT also disputes the superiority of IDJ's interest. IDJ replies that fraudulent activity does not preclude the economic justification defense, and that courts can determine the superiority of the parties' economic interests before trial.

CMC Project generally, its assent to this specific detail, namely, the CMC Album's release date, is essential to the agreement embodied in the Side Letter. For example, the Court notes that the Side Letter reads in relevant part: "In consideration for your agreement to comply with and honor all of the terms and conditions set forth in the [Heads of] Agreement (as same pertains to or affects you) and to permit 'Ja Rule', Murderers Inc. and Irv Gotti to perform for us and grant to us the rights set forth in the Agreement, you and we hereby agree as follows ...." (Reply Declaration of Michael T. Mervis dated January 29, 2003 ("Mervis Decl."), Ex. A.) The Side Letter contains no explicit reference to the CMC Album's release date, and, while it does reference the terms of the Heads of Agreement which specified a release in November 2001, IDJ has not shown how this term "pertains to or affects" IDJ in any material way.

To begin, it is clear that fraud does preclude the economic justification defense to a tortious interference claim. The three cases to which the parties devote the bulk of their attention regarding this issue all indicate as much. *See, e.g., Blanchard v. Eisenpress*, 200 F.Supp.2d 334, 337 (S.D.N.Y.2002) ("Although plaintiffs have made a number of conclusory statements alleging fraud ..., nothing in the complaint asserts that [the defendants] acted in bad faith, or employed illegal means or in any way were involved in any wrongdoing."); *Foster v. Churchill*, 87 N.Y.2d 744, 642 N.Y.S.2d 583, 665 N.E.2d 153, 157 (1996) (sustaining economic justification defense where lack of good faith did not rise to the level of "independent torts"); *Morse v. Swank, Inc.*, 493 F.Supp. 110, 117 (S.D.N.Y.1980) ("[T]he record provides no evidence of Swank's use of unlawful means from which a jury could conclude that Swank's interference, to the extent it existed, was not privileged or was otherwise wrongful."). In this case, TVT does allege fraudulent activity by IDJ, which this Court addresses in Section II.D *supra*. For these reasons and those discussed in Section II.D *supra*, the Court concludes that there exists a triable question of fact as to whether IDJ engaged in fraudulent activity that would preclude it from invoking the economic justification defense.

Furthermore, IDJ's assertion that it had a superior economic interest justifying interference assumes that there is no dispute as to whether IDJ assented to the agreement embodied in the Side Letter. If IDJ did assent, as TVT maintains, then the activities that TVT alleges constitute a procurement of a breach of the Heads of Agreement cannot be excused by a claim of economic justification because IDJ's economic interest would no longer be superior to TVT's interest in the CMC Album's exploitation. This conclusion follows, assuming TVT establishes assent, not only because IDJ's assent would carve out for TVT an exception to the exclusivity of IDJ's rights to the Artists' services, on which IDJ's superiority claim is based, but also because TVT's allegations include a profit-sharing

agreement benefitting IDJ and thus rendering IDJ's economic interests in the CMC Album inextricably linked with, rather than superior to, those of TVT. For these reasons, the Court concludes that a disputed issue of fact exists concerning the superiority of the parties' economic interests and, in turn, the availability of the economic justification defense to IDJ.

3. ***Parties To The Heads Of Agreement***

IDJ's third argument is that, taking TVT's assertion that IDJ assented to the agreement embodied in the Side Letter as true, IDJ itself became a party to the Heads of Agreement. Therefore, the argument goes, IDJ cannot be found to have tortiously interfered with its own contract.

The evidence indicates that TVT negotiated the Heads of Agreement with the Artists before negotiating the Side Letter with IDJ.[5] Also, the Heads of Agreement, as IDJ itself points out, included various strong indemnification clauses and warrantees by the Artists and imposes on them the duty to secure any permissions or authorizations necessary for them to supply content for the CMC Album. (Eddington Decl., Ex. I at 56-57.) TVT promised, among other things, compensation in return. Accordingly, the Heads of Agreement includes terms defining rights and obligations enforceable as between the Artists and TVT independent of the Side Letter and that stand alone, in spite of IDJ's presence or absence as a party to the Heads of Agreement. The Side Letter incorporates the Heads of Agreement only to the extent that it "pertains to or affects" IDJ. (Mervis Decl., Ex. A.) For these reasons, the Court is not persuaded that it must take the Side Letter and the Heads of Agreement together as a single contract on the

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[5] The Heads of Agreement is dated as of July 2, 2001. (Eddington Decl., Ex. R.) According to Gottlieb, the negotiations with Cohen concerning the terms of the agreement embodied in the Side Letter occurred in August and early September 2001, (Gurley Decl., Ex. A at 70), and the Side Letter is dated as of September 24, 2001, (Eddington Decl., Ex. L).

present record. Therefore, IDJ's argument that it cannot be held liable for tortiously interfering with its own contract must be rejected.

D. ***FRAUD***

IDJ also argues that TVT's claims for fraud must be dismissed on the pleadings as duplicative of its breach of contract claim. TVT responds that it has alleged independent grounds for fraud that are collateral to the underlying agreements. The Court agrees with TVT.

To state a claim for fraud under New York law, a plaintiff must establish that "(1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance." *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 20 (2nd Cir.1996) (citations omitted; internal quotations omitted). Where a plaintiff alleges both a breach of contract and a fraud claim arising from the same series of events, New York courts have been cautious in sustaining an independent fraud claim. The Second Circuit has instructed that, in order to maintain both a plaintiff must either: "(i) demonstrate a legal duty separate from the duty to perform under the contract ...; or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract ...; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages ...." *Id.* (citations omitted).

The Second Circuit has also cautioned that " 'simply dressing up a breach of contract claim by further alleging that the promisor had no intention, at the time of the contract's making, to perform its obligations thereunder, is insufficient to state an independent tort claim.' " *Telecom Int'l Am., Ltd. v. AT & T Corp.*, 280 F.3d 175, 195 (2nd Cir.2001) (quoting *Best W. Int'l, Inc. v. CSI Int'l Corp.*, No. 94 Civ. 0360, 1994 WL 465905, at *4 (S.D.N.Y. Aug. 23, 1994)). The Circuit Court has further elaborated, however, that:

> we find dispositive the New York Court of Appeals' distinction between ... "promissory statements as to what will be done in the future," which give rise only to a breach of contract claim, and ... false "representations of present fact," which give rise to a separate claim of fraudulent inducement.

Stewart v. Jackson & Nash, 976 F.2d 86, 88 (2nd Cir.1992) (quoting *Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.*, 68 N.Y.2d 954, 510 N.Y.S.2d 88, 502 N.E.2d 1003, 1004 (1986)). In this vein, the New York Court of Appeals has declared that "[w]hile [m]ere promissory statements as to what will be done in the future are not actionable [in tort] ..., it is settled that, if a promise was actually made with a preconceived and undisclosed intention of not performing it, it constitutes a misrepresentation of a material existing fact" upon which a fraud claim may be based. *Sabo v. Delman*, 3 N.Y.2d 155, 164 N.Y.S.2d 714, 143 N.E.2d 906, 908 (1957) (citations omitted; internal quotations omitted). *See also U.S. East Telecomm., Inc. v. U.S. West Communications Servs., Inc.*, 38 F.3d 1289, 1301 (2nd Cir.1994) (recognizing divergent case law). The New York Court of Appeals more recently confirmed that "[a] false statement of intention is sufficient to support an action for fraud, even where that statement relates to an agreement between the parties." *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 629 N.Y.S.2d 1009, 653 N.E.2d 1179, 1184 (1995).

In this case, TVT's allegations against IDJ are more consistent with the fact patterns at issue and the courts' reasoning in *Stewart*, *Sabo*, and *Graubard* because TVT claims that IDJ's actions reflected IDJ's ulterior motives independent of the bargain comprising the putative contract. TVT alleges that IDJ did more than simply fail to satisfy its putative obligations under the agreement embodied in the Side Letter. TVT claims that IDJ also concealed its intent not to follow through with these alleged obligations for a threefold purpose: to placate Gotti while

IDJ negotiated for an extension of Gotti's employment contract with IDJ; to induce TVT to grant IDJ permission to use "Get Tha Fortune" in IDJ's video release entitled "Irv Gotti Presents: The Inc."; and ultimately to acquire for itself the CMC Album content produced by the Artists for TVT.[6] Such concealment and ulterior motives are certainly related to the basis for TVT's claim for breach of contract, namely, IDJ's nonperformance of its putative commitment to authorize the CMC Project to go forward, in exchange for which IDJ would receive a share of the profits from CMC Album sales. Nonetheless, these additional benefits reflect sufficiently collateral purposes behind IDJ's putative representations and assurances so as to sustain an independent claim for fraud.

TVT's claims for fraud are not simply "dressed up" breach of contract claims. This is not a case where the defendant is alleged simply to have intended to derive the benefit of a bargain while, in the end, refusing to satisfy his own obligations. A reasonable jury could conclude that the activities TVT attributes to IDJ are indicative foremost of fraud, in the course of which a putative contract was utilized. Because, according to TVT, IDJ had no good faith intention to perform under the contract but, rather, simply intended to delay TVT's business dealings with Gotti until after Gotti was re-signed to IDJ, the fact that the dilatory tool took the form of a putative contact does not obviate the

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[6] These allegations are rooted generally in TVT's complaint dated August 20, 2002 (the "Complaint"), (*see, e.g.*, Complaint, ¶¶ 1, 4, 6, 18, 22, 34, 44, 60, and 63), and were developed and articulated more fully during the preliminary injunction hearing and subsequent conferences before the Court. Because IDJ challenges TVT's fraud claims as precluded by law in light of TVT's assertion of breach of contract, and not on either factual sufficiency or Rule 8 notice grounds, the Court need not convert IDJ's motion for judgment on the pleadings into a motion for summary judgment. Instead, the Court will address IDJ's argument as a challenge to the legal, rather than factual, sufficiency of TVT's claims for fraud as presently developed. *See, e.g., Villante v. Dep't of Corr. of the City of New York*, 786 F.2d 516, 521 (2nd Cir.1986); *Motrade v. Rizkozaan, Inc.*, No. 95 Civ. 6545, 1998 WL 108013, at *3 (S.D.N.Y. March 11, 1998).

alleged fraudulent nature of this tactic. If, as TVT maintains, IDJ intended to induce TVT to grant it a license for "Get Tha Fortune," the fact that such inducement took the form of a putative contract also does not preclude an otherwise viable fraud claim. Similarly, if, as TVT alleges, IDJ induced TVT into expending substantial resources in financing and arranging for the production of the CMC Album so that IDJ ultimately could appropriate it for its own use, the fact that the method employed to achieve such inducement was a putative contract would not render this scheme any less fraudulent. The Court concludes that, taking these allegations by TVT as true, as it must for purposes of IDJ's present motion, TVT's claims for fraud are not redundant of its claim for breach of contract. For these reasons, IDJ's challenge to TVT's fraud claims must be rejected.

E. *THE COVENANT OF GOOD FAITH AND FAIR DEALING*

IDJ next argues that TVT's claim for breach of the covenant of good faith and fair dealing under New York law must be dismissed on the pleadings as duplicative of TVT's breach of contract claim. TVT responds that its claim for breach of the covenant exists as a separate cause of action distinct from its breach of contract claim and not based on the same allegations. The Court agrees with IDJ.

The New York Court of Appeals has instructed that

> [i]mplicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance .... Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included .... This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract .... The duty of good faith and fair dealing,

> however, is not without limits, and no obligation can be implied that would be inconsistent with other terms of the contractual relationship.

Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 639 N.Y.S.2d 977, 663 N.E.2d 289, 291-92 (1995) (citations omitted; internal quotations omitted). The Second Circuit has further counseled, with respect to this doctrine, that "[t]he boundaries set by the duty of good faith are generally defined by the parties' intent and reasonable expectations in entering the contract." *Cross & Cross Props., Ltd. v. Everett Allied Co.*, 886 F.2d 497, 502 (2nd Cir.1989). The covenant does not exist in the absence of an underlying contract and is intended to serve "in aid and furtherance of other terms of the agreement of the parties." *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86, 91 (1983); *see Alter v. Bogoricin*, No. 97 Civ. 0662, 1997 WL 691332, at *7 (S.D.N.Y.1997) ("[T]he covenant of good faith and fair dealing is not distinct from the underlying contract ....").

As this Court has previously ruled, a claim for breach of the covenant "will be dismissed as redundant where the conduct allegedly violating the implied covenant is also the predicate for breach ... of an express provision of the underlying contract." *EUA Cogenex Corp. v. North Rockland Cent. Sch. Dist.*, 124 F.Supp.2d 861, 873 (S.D.N.Y.2000) (citations omitted; internal quotations omitted); *Alter*, 1997 WL 691332, at *7. Such a claim may be maintained "only if it is based on allegations different than those underlying the accompanying breach of contract claim." *Siradas v. Chase Lincoln First Bank, N.A.*, No. 98 Civ. 4028, 1999 WL 787658, at *6 (S.D.N.Y. Sept. 30, 1999). The covenant protects a promisee not against a breach of the express terms of a contract but of the reasonable expectations and inferences otherwise derived from the agreement. *See Sauer*, 95 F.Supp.2d at 132 ("[S]uch a claim may be brought ... only where one party's conduct, though not breaching the terms of the contract in a technical sense,

nonetheless deprived the other party of the benefit of its bargain."); *Restatement (Second) of Contracts* § 205, cmts. a, c (1981) ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party ...."); *see also* 2 A. Corbin, *Corbin on Contracts* § 5.27, at 134-40 (Rev. ed.1995).

In this case, the parties agree that IDJ ultimately withheld its written consent to the CMC Project. The issue to be determined by the jury is whether IDJ, before doing so, made representations and gave assurances of assent to the agreement embodied in the Side Letter, as TVT alleges in its Complaint. If a jury concludes that no such representations or assurances were given, in other words, that no contract between the parties, oral or otherwise, was created, then Robinson's letter to Leibowitz dated August 14, 2002,[7] expressing IDJ's lack of consent, is nothing more than a rejection of TVT's offer as embodied in the Side Letter. In this case, a claim for breach of the covenant of good faith and fair dealing cannot lie because no contract to which such good faith and fairness would relate would exist. *See, e.g., Murphy*, 461 N.Y.S.2d 232, 448 N.E.2d at 91 (covenant is intended to serve "in aid and furtherance of other terms of the agreement of the parties."); *Alter*, 1997 WL 691332, at *7 ("[T]he covenant of good faith and fair dealing is not distinct from the underlying contract ....").

On the other hand, if a jury were to conclude that an agreement as embodied in the Side Letter was formed through the assertions, representations, and actions manifesting belief in the existence of valid agreements as alleged by TVT, then IDJ's letter of August 14, 2002, as well as other actions by IDJ inconsistent with the terms of any such agreement, would amount to a breach of this commitment. In this context, because IDJ's rejection letter would clearly constitute a repudiation or breach, TVT would

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[7] This letter is referenced in paragraphs 23 and 33 of the Complaint.

have to point to other obligations reasonably understood and implied by the agreement embodied in the Side Letter, that IDJ's actions violated, as a basis to assert a breach of the covenant. *See EUA Cogenex Corp.*, 124 F.Supp.2d at 873; *Siradas*, 1999 WL 787658, at *6. TVT alleges no such independent violations. Rather, it points to its expenditures made in furtherance of the CMC Project and in reliance on IDJ's alleged representations, and to its granting IDJ a license to use "Get Tha Fortune."

The time and resources TVT devoted to the CMC Project are the byproducts of IDJ's putative assent and alleged breach of contract, as is any perceived harm to reputation and business standing. However, these potential damages do not constitute an independent basis for a violation of the presumed agreement embodied in the Side Letter. Accordingly, such losses cannot sustain a claim for breach of the covenant because they are not independent of the putative breach of contract.

With respect to the "Get Tha Fortune" license, that contract was independently negotiated and executed, and nothing in the Side Letter can reasonably be interpreted as suggesting any specific obligations on the part of IDJ in regards to this separate arrangement.[8] *See Dalton*, 639 N.Y.S.2d 977, 663 N.E.2d at 291-92 ("Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included."); *Cross & Cross Props., Ltd.*, 886 F.2d at 502 ("The boundaries set by the duty of good faith are generally defined by the parties' intent and reasonable expectations in entering the contract."). Therefore, while this license is, according to TVT, an independent consequence of the

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[8] This letter is referenced in paragraphs 14, 31, and 36 of the Complaint.

agreement embodied in the Side Letter,[9] it is not related to any obligations to which IDJ can reasonably be said to have committed itself if, as is presently assumed, it did enter into the agreement embodied in the Side Letter. Therefore, the "Get Tha Fortune" license cannot form the basis for a claim for breach of the covenant as regards this agreement. TVT has alleged no other basis for this claim. For these reasons, TVT's claim for breach of the covenant of good faith and fair dealing must be dismissed.

III. *CONCLUSION AND AMENDED ORDER*

For the reasons discussed above, it is hereby

ORDERED that the Court's Order dated February 4, 2003 is amended to incorporate the discussion set forth herein; and it is further

ORDERED that the portion of IDJ's motion seeking summary judgment dismissing TVT's copyright infringement claims is DENIED; and it is further

ORDERED that the portion of IDJ's motion seeking summary judgment dismissing TVT's tortious interference with contract claims is DENIED; and it is further

ORDERED that the portion of IDJ's motion seeking judgment on the pleadings dismissing TVT's fraud claims is DENIED; and it is further

ORDERED that the portion of IDJ's motion seeking judgment on the pleadings dismissing TVT's claim for breach of the covenant of good faith and fair dealing is GRANTED.

SO ORDERED.

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[9] Gottlieb testified that he would not have permitted IDJ to use TVT's "Get Tha Fortune" material had he not understood IDJ to have assented to the agreement embodied in the Side Letter. (Gurley Decl., Ex. A at 300-301, 313-14.)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

TVT RECORDS and TVT MUSIC, INC.
Plaintiff,

v.

THE ISLAND DEF JAM MUSIC GROUP and LYOR COHEN,
Defendant.

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02 Civ. 6644 (VM).

DECIDED APRIL 8, 2003.

DECISION AND ORDER

Opinion by VICTOR MARRERO, United States District Judge:

During the liability phase of the trial of this matter, defendants Lyor Cohen and The Island Def Jam Music Group ("IDJ" and, collectively with Mr. Cohen, the "Defendants") moved this Court for an order pursuant to Rule 50(a) of the Federal Rules of Civil Procedure for judgment as a matter of law. The Court heard arguments from the parties on the matter on March 17, 2003 and reserved judgment on the motion, indicating that it would set forth its findings, conclusions and reasoning following the jury's verdict. On March 21, 2003, the jury returned a verdict of liability against the Defendants, and the damages phase of the trial of this matter was set for April 28, 2003 before the same jury.

At this time, the Court will briefly address the Defendants' Rule 50(a) motion. For the reasons discussed

below, Defendants' motion for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure is denied.

I. DISCUSSION

A. STANDARD OF REVIEW

Rule 50(a) of the Federal Rules of Civil Procedure allows a party to move for judgment as a matter of law at any time before the case has been submitted to the jury. See *Wimmer v. Suffolk County Police Dep't*, 176 F.3d 125, 134 (2nd Cir. 1999). A motion filed pursuant to Rule 50(a) may be granted if there is no legally sufficient evidentiary basis to support the non-moving party's claim or defense. *See* Fed. R. Civ. P. 50(a); *Wimmer*, 176 F.3d at 134; *Piesco v. Koch*, 12 F.3d 332, 340 (2nd Cir. 1993); *Sanders v. The City of New York*, 200 F. Supp.2d 404, 406 (S.D.N.Y. 2002). In assessing the merits of a Rule 50(a) motion, courts must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See Wimmer*, 176 F.3d at 134; *Piesco*, 12 F.3d at 340; *Sanders*, 200 F. Supp.2d at 406.

B. BREACH OF CONTRACT

The evidence is sufficient to support a jury finding of breach of contract against IDJ. The contract plaintiffs TVT Records and TVT Music, Inc. (collectively "TVT") allege IDJ breached is the agreement embodied in the so-called Side Letter Agreement, pursuant to which IDJ is claimed to have consented to the CMC Album project in exchange for a share of the profits. The evidence is sufficient to support a finding that TVT performed under this agreement. For example, the evidence shows that TVT in part organized the project, made payments to Ja Rule and Irv Gotti (collectively the "Artists"), and assumed expenses for recording costs and advertising promotions. The record also supports a finding that TVT was damaged to some degree in that it has yet not been able to distribute and exploit a CMC Album. The record further indicates that IDJ did not properly perform pursuant to this contract in that it

withheld its consent and thereby delayed the completion, delivery, and exploitation of the CMC Album.

The core issue of dispute concerns whether IDJ ever entered into this contract, orally, in writing, or through conduct. The evidence is sufficient to permit a reasonable jury to conclude that it had. For example, Steve Gottlieb testified that Mr. Cohen reluctantly agreed to permit the CMC Album project to go forward and that the two agreed on the profit sharing arrangements. Also, a jury could reasonably not credit Mr. Cohen's testimony that he never consummated these negotiations into a binding agreement in light of instances, highlighted through cross-examination, of inconsistencies in his various statements on the matter. By the same token, a reasonable jury could credit Mr. Gottlieb's word over that of Mr. Cohen and conclude that IDJ did enter into this agreement.

Also, Mr. Gottlieb's version of the events was consistent with that of William Leibowitz who testified about assurances from Jonathan Lieberman and Jeffrey Kempler that IDJ had in fact consented to the Side Letter Agreement and underlying CMC Album project. In this vein, a reasonable jury could credit IDJ's failure to respond to Mr. Leibowitz's November 15, 2001 so-called "reliance letter" as corroborating evidence of assent. Finally, a reasonable jury could conclude that these three IDJ employees—Mr. Cohen, Mr. Kempler, and Mr. Lieberman—were agents with the ability to bind IDJ based on based evidence such as their job titles appearing on IDJ letterhead and e-mails, based on their being copied on correspondences, and based generally on Mr. Gottlieb and Mr. Leibowitz's understanding of these individuals' roles as prominent figures employed by a prominent entity in the industry. Therefore, on this record, a reasonable jury could conclude that IDJ formed a contract with TVT and then failed to perform.

C. PROMISSORY ESTOPPEL

The evidence above also reasonably supports a finding that IDJ, through Mr. Cohen, and Mr. Cohen himself, made

an explicit promise to Mr. Gottlieb, namely, that IDJ would permit the CMC Album to proceed, in accordance with Mr. Gottlieb's testimony. In light of the ongoing business relationship between IDJ and the Artists—Ja Rule and Irv Gotti—a reasonable jury could conclude that it was reasonable for TVT to rely on such an explicit promise by IDJ to TVT, given IDJ's failure to respond to Mr. Leibowitz's November 15, 2001 reliance letter and given that IDJ's failure to perform under that promise would be a detriment to the Artists, who also had begun to create material for the CMC Album and who had ongoing business relationships with IDJ. TVT knew that the Artists began working on material for the CMC Album, given communications concerning payments and reimbursements pursuant to the Heads of Agreement and concerning arrangements for promotions and a photo shoot for the album, for example.

Furthermore, a rational jury could conclude that IDJ and Mr. Cohen should have foreseen that TVT would go forward with the CMC Album project in reliance on this putative promise in light of: Mr. Leibowitz's November 15 letter to that effect; evidence of Mr. Gottlieb's apparent eagerness to proceed; Ja Rule's reported desire to help his former colleagues which had been conveyed, the record reveals, to both TVT and to IDJ and Mr. Cohen; and the August 1, 2001 letter of direction from Murder Inc. and surrounding internal communications among IDJ employees signifying that IDJ paid Irv Gotti money for advances to 0-1 and Chris Black and sought reimbursement from TVT out of CMC Album profits. And, again, the record supports a reasonable finding that TVT was injured insofar as it has not yet been able to release the CMC Album in light of IDJ's nonperformance under the promise TVT claimed. Therefore, the record is sufficient to permit a reasonable jury to find IDJ liable under the doctrine of promissory estoppel.

D. TORTIOUS INTERFERENCE

The evidence presented is sufficient to support a jury finding of liability as against IDJ and Mr. Cohen for tortious interference with contractual relations. The record indicates that the Heads of Agreement was executed by the Artists and that TVT, for the reasons already explained, took action to perform its obligations under this contract, thus permitting a reasonable jury to conclude that both sides—TVT, by conduct, and the Artists by signature—had entered into the Heads of Agreement. Additionally, a reasonable jury could conclude, based on the various communications and the negotiations relating to the Side Letter Agreement between TVT and IDJ and Mr. Cohen, that IDJ and Mr. Cohen were aware of the existence of a contract between TVT and the Artists to produce the CMC Album.

The record also indicates that: TVT has yet to receive marketable master recordings of tracks for the CMC Album; that Mr. Gotti and Ja Rule are under exclusive contract with IDJ—meaning that if they perform in accordance with their obligations under the Heads of Agreement without IDJ's consent, they would be in breach of those contracts; and that IDJ and Mr. Cohen have withheld their consent to the CMC Album, at least as signified by Brian Robinson's August 14, 2002 letter to Mr. Leibowitz, among other things. This evidence is sufficient to permit a reasonable jury to conclude that IDJ's and Mr. Cohen's withholding of consent induced the Artists to not perform for fear of violating their exclusive services contracts with IDJ, and that by so withholding their consent and triggering this consequence of nondelivery, Mr. Cohen and IDJ intentionally interfered with or procured the breach of the Heads of Agreement. And, once again, TVT has been harmed insofar as it has yet to be able to exploit a CMC Album. For these reasons, the record is sufficient to support a reasonable finding that IDJ and Mr. Cohen tortiously interfered with TVT's contractual relations with the Artists, specifically, with the Heads of Agreement.

The Court notes on this matter IDJ's argument that by failing to deliver the CMC Album materials to TVT in November 2001, the Artists breached the Heads of Agreement independent of any action by IDJ or Mr. Cohen and that, therefore, IDJ and Mr. Cohen cannot be liable for interfering with or procuring the breach of a contract that had already been breached. A reasonable jury, however, can conclude, based on the potential credibility assessment as between Mr. Gottlieb and Mr. Cohen discussed above, and based on testimony by Mr. Gottlieb and Mr. Gotti, that TVT and Mr. Gotti did not treat the nondelivery of CMC Album materials in November of 2001 as a breach but, rather, continued performance and agreed on delivery for a November 2002 release. Evidence in the record reflecting TVT's continued performance has already been addressed, and evidence that the Artists continued performing includes their requests for reimbursement of studio costs, their participation in promotional events, and their delivery of preliminary roughs of certain CMC Album tracks in early to mid-2002. For these reasons, a reasonable jury could reject IDJ's claim that the Heads of Agreement had been breached by the Artists and therefore could not have been interfered with or breached by the actions of IDJ and Mr. Cohen.

The Court also notes that a reasonable jury can reject IDJ and Mr. Cohen's defense of economic justification on this record. For reasons already indicated, a reasonable jury could conclude that IDJ did assent to the CMC Album project and, accordingly had a significant economic stake in the profits from CMC Album sales. This stake, combined with evidence that so-called "exclusive artists" participate in projects driven by other labels with some regularity in the industry, could lead a reasonable jury to conclude that IDJ and Mr. Cohen's economic interests were not superior to or inconsistent with the release of the CMC Album.

The evidence is also sufficient to support a reasonable jury finding that the Side Letter Agreement and the Heads of Agreement were not intended by the parties to constitute a single integrated contract. In particular, the evidence

establishes that the Heads of Agreement and the Side Letter Agreement were negotiated separately, that the Heads of Agreement was mostly negotiated before the Side Letter Agreement negotiations began, and that neither document explicitly states an intention by the relevant parties that the Heads of Agreement and the Side Letter Agreement are intended to constitute a single contract. Also, the Heads of Agreement included various strong indemnification clauses and warrantees by the Artists and imposes on them the duty to secure any permissions or authorizations necessary for them to supply content for the CMC Album. TVT promised, among other things, compensation in return. Accordingly, the Heads of Agreement includes obligations enforceable against the Artists and against TVT in spite of IDJ's participation. Additionally, the Side Letter references the Heads of Agreement only to the extent that it "pertains to or affects" IDJ. For these reasons, a reasonable jury can conclude that IDJ and Mr. Cohen have not established that the relevant parties intended the two documents to represent a single contract, and, consequently, their defense that they cannot be liable for tortiously interfering with a contract to which they are parties could reasonably be rejected by a jury.

E. FRAUD BY FRAUDULENT CONCEALMENT

The evidence introduced at trial is adequate to support a reasonable finding of liability as against IDJ and Mr. Cohen for fraud by fraudulent concealment. A reasonable jury could conclude, on this record, that IDJ and Mr. Cohen committed or otherwise falsely represented to TVT their assent to the CMC Album project specifically for the undisclosed purpose of self-promoting their own interest in placating Mr. Gotti and Ja Rule, whose contracts with IDJ, the evidence shows, were extended and renegotiated in late 2001 through early 2002 and in mid-2002, respectively. A reasonable jury could further conclude that IDJ and Mr. Cohen did so in order to advance IDJ's business interests, knowing and intending that they would not follow through with such consent in the end, and knowing that TVT had

and would rely on their incomplete and inaccurate representations. In particular, a reasonable jury could support a finding of fraudulent concealment from evidence of Mr. Cohen's various statements that he was uncomfortable with the CMC Album project while at the same time failing to formally and explicitly reject it, as well as the proximity in time between Ja Rule's contract amendment—in early August 2002—and Mr. Robinson's letter to Mr. Leibowitz dated August 14, 2002 purporting to reject the Side Letter Agreement.

The evidence can reasonably support a further finding that IDJ and Mr. Cohen intended to permit the CMC Album project to proceed, so as to placate the Artists as discussed, and then appropriate the materials produced for this album for release, either in whole or in part, under IDJ's label rather than under TVT's label. IDJ's use of "Get Tha Fortune" and "The Rain" evinces an interest in CMC performances by IDJ and Mr. Cohen, and language in Ja Rule's amended employment contract with IDJ stating that CMC Masters recorded "at various times" might be acquired for IDJ and, if so, credited toward one of Ja Rule's future album obligations supports a reasonable conclusion to this effect.

A jury could reasonably determine that such ulterior motives were concealed from TVT, which, in consequence, invested time and resources in the CMC Album project. In light of the obvious benefits to IDJ and Mr. Cohen that flow from such concealment, namely, facilitating IDJ's contract renegotiations with the Artists and permitting IDJ to potentially release the CMC Album materials under its own label, it is not unreasonable for a jury to infer an intent by IDJ and Mr. Cohen to defraud TVT, which had arranged and paid for the creation of these materials. Finally, as Mr. Cohen was copied on various correspondences and e-mail messages concerning these contract renegotiations and attendant issues, and given his role as chairman of IDJ coupled with the importance of these Artists to IDJ's business, a reasonable jury could conclude that he had actual

knowledge of the indicated motives and events. For these reasons, the record adequately supports a jury finding of liability against IDJ and Mr. Cohen for fraud by fraudulent concealment.

F. COPYRIGHT INFRINGEMENT

The originality of "The Rain" and "Get Tha Fortune" have never been contested. A reasonable jury could have listened to these works using the equipment provided to them in the jury room and concluded that, in fact, they are original works of authorship. It is also uncontested that these works appeared on the "Irv Gotti Presents: The Inc." CD and DVD. What is in dispute is whether TVT owned "The Rain" and whether IDJ distributed these materials pursuant to valid licenses.

First, a reasonable jury could conclude that, pursuant to the terms of the Heads of Agreement, the copyright in the song "The Rain" would be owned by TVT, and that this song was produced for the CMC Album as evidenced by Mr. Gotti's delivery of a rough version of this song to TVT in the first part of 2002.

IDJ and Mr. Cohen claim that "The Rain" and "Get Tha Fortune" were distributed pursuant to valid licenses, oral and written, respectively. TVT claims that the licenses were invalid because of fraudulent behavior by IDJ that induced TVT to grant Mr. Gotti permission to use "The Rain" and IDJ permission to use "Get Tha Fortune." A reasonable jury could conclude that IDJ did engage in fraud for the reasons stated with respect to TVT's claim of fraud by fraudulent concealment.[1] A jury reasonably could credit Mr. Gottlieb and Brian Leach's testimony that permission to use these materials would not have been granted but for the anticipated November 2002 release of the CMC Album because the publication of "The Rain" and "Get Tha Fortune" would serve as a promotional setup for the album

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[1] It is the evidence underlying the legal finding of fraud by fraudulene concealment, and not necessarily the legal finding itself that is relevant here.

in the marketplace. Given the evidentiary support for a reasonable finding of fraud with respect to IDJ's consent to the CMC Album, as already discussed, such evidence of fraud nullifies the putative licenses granted by TVT to Mr. Gotti and IDJ for use of "The Rain" and "Get Tha Fortune," respectively, in light of TVT's reliance and expectation. That is, without a November 2002 release of the CMC Album, and, indeed, without a CMC Album release at all, according to Mr. Gottlieb and Mr. Leach's testimony—which, again, a jury could reasonably credit—TVT's reasons for granting the licenses would not exist. For these reasons, it is reasonable for a jury to conclude, on this record, that the licenses IDJ and Mr. Cohen assert as defenses for IDJ's exploitation of "The Rain" and "Get Tha Fortune" on the "Irv Gotti Presents: The Inc." CD and DVD were invalid, and that, consequently, their use of these materials violated TVT's copyrights.

Furthermore, to the extent the evidence, for the reasons discussed, supports a finding that TVT's permission was obtained by fraud, that same evidence, in particular, IDJ's undisclosed motives of placating the Artists pending their contract renegotiations and IDJ's interest in potentially acquiring the CMC Album materials for release under IDJ's label rather than that of TVT, supports a finding that IDJ knew of or recklessly disregarded TVT's rights to "The Rain" and "Get Tha Fortune" when it included these materials on the "Irv Gotti Presents: The Inc." CD and DVD—in other words, that the infringement was willful.

On the matter of Mr. Cohen's liability as a corporate officer, as already indicated in the Court's discussion of the sufficiency of the evidence regarding TVT's claim of fraud, a reasonable jury could conclude based on the evidence that Mr. Cohen had knowledge of IDJ's undisclosed motives to placate the Artists pending their contract renegotiations and to potentially acquire the CMC Album materials for IDJ. To the extent that such claimed fraudulent activity formed the basis for TVT's granting Mr. Gotti and IDJ licenses to use "The Rain" and "Get Tha Fortune," the

evidence highlighted in support of the fraud also reasonably supports a finding that Mr. Cohen knew that IDJ's use of these materials was not authorized by a legitimate license, in other words, that it constituted infringement. Furthermore, to the extent that Mr. Cohen's conversations with Mr. Gottlieb constituted part of the activity determined to be fraudulent, this same activity supports a finding that he knowingly participated in the infringement of these materials. Therefore, the evidence can reasonably support a jury finding of copyright infringement and contributory copyright infringement as against Mr. Cohen. Also, this same knowledge and the underlying undisclosed motives support a reasonable finding that infringement by Mr. Cohen was willful.

Additionally, to the extent that Mr. Cohen served as chairman of IDJ, a reasonable jury could conclude that he had a financial interest in IDJ's business performance, which, in turn, was potentially benefitted by the use of "The Rain" and "Get Tha Fortune" on IDJ releases. Mr. Cohen's position as chairman of IDJ and the corporate agreements between IDJ and Mr. Gotti regarding Murder Inc. indicate that Mr. Cohen had the right and ability to supervise the use of TVT's materials on the IDJ releases, even though as a general rule the parties involved made a practice of deferring artistic decisions to Mr. Gotti. For these reasons, the evidence is sufficient to permit a reasonable jury to find Mr. Cohen liable for vicarious copyright infringement as well.

II. CONCLUSION AND ORDER

For the reasons stated above, it is hereby

ORDERED that the Defendants' motion for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure is denied.

SO ORDERED.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

TVT RECORDS and TVT Music, Inc.,
Plaintiffs,

v.

THE ISLAND DEF JAM MUSIC GROUP
and Lyor Cohen,
Defendants

No. 02 CIV. 6644

May 21, 2003.

DECISION AND ORDER

MARRERO, District Judge.

During the damages phase of the trial of this matter, defendants Lyor Cohen ("Cohen") and The Island Def Jam Music Group ("IDJ" and, collectively with Cohen, the "Defendants") moved this Court for an order pursuant to Rule 50(a) of the Federal Rules of Civil Procedure for judgment as a matter of law. The Court heard arguments from the Defendants and from plaintiffs TVT Records and TVT Music, Inc. (collectively, "TVT") on the matter on May 1, 2003 and reserved judgment on the motion, indicating that it would set forth its findings, conclusions and reasoning following the jury's verdict. The Court also received and reviewed Defendants' Rule 50(a) Motion (undated) on May 1, 2003 and Plaintiffs' Opposition to Defendants' Motions Pursuant to FRCP 50(a) dated May 6, 2003. On May 2, 2003, the jury returned a verdict awarding damages on all of TVT's claims it was asked to consider.

At this time, the Court will briefly address the Defendants' Rule 50(a) motion. For the reasons discussed below, the Defendants' motion for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure is denied.

I. *DISCUSSION*

A. *STANDARD OF REVIEW*

Rule 50(a) of the Federal Rules of Civil Procedure allows a party to move for judgment as a matter of law at any time before the case has been submitted to the jury. *See Wimmer v. Suffolk County Police Dep't*, 176 F.3d 125, 134 (2d Cir.1999). A motion filed pursuant to Rule 50(a) may be granted if there is no legally sufficient evidentiary basis to support the non-moving party's claim or defense. *See* Fed.R.Civ.P. 50(a); *Wimmer*, 176 F.3d at 134; *Piesco v. Koch*, 12 F.3d 332, 340 (2d Cir.1993); *Sanders v. The City of New York*, 200 F.Supp.2d 404, 406 (S.D.N.Y.2002). In assessing the merits of such a motion, courts must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See Wimmer*, 176 F.3d at 134; *Piesco*, 12 F.3d at 340; *Sanders*, 200 F.Supp.2d at 406.

B. *COMPENSATORY DAMAGES*

1. *Breach of Contract*

With respect to TVT's claim of breach of contract against IDJ, TVT upon a proper showing is entitled to special damages in the form of lost profits from the CMC Album adjusted in accordance with the relevant profit sharing arrangements, the details of which are in evidence. In this regard, relevant evidence includes TVT's expert testimony by Bruce Kolbrenner ("Kolbrenner") and David Berman ("Berman") regarding the projected value of the CMC Album which the jury can reasonably credit to arrive at an award on this claim with reasonable certainty against IDJ. In particular, Kolbrenner's testimony and report presented sales, revenues, and profit projections reflecting alternative assumptions among which the jury would select

based on the broader evidence before it, including testimony of CMC Album marketplace performance offered by, among others, Irv Gotti ("Gotti"), Berman, Steve Gottlieb ("Gottlieb"), and Kolbrenner himself. A jury could reasonably conclude, furthermore, based on evidence of Cohen's and IDJ's history and experiences in the record industry, that they did or should have contemplated these losses during 2001-2002, which, according to the jury's findings during the liability phase of this trial, was the period during which the Side Letter Agreement was formed and then breached by IDJ.

2. ***Tortious Interference With Contractual Relations***

With respect to TVT's claim of tortious interference with contractual relations, TVT is entitled to the monetary loss of the benefits of the Heads of Agreement. Once again, relevant evidence includes Kolbrenner's and Berman's testimony and expert reports regarding the projected value of the CMC Album which the jury can reasonably credit to arrive at an award with reasonable certainty against Cohen and IDJ. Taken together with other evidence of marketplace performance offered by, among others, Gotti and Gottlieb, a jury could reasonably isolate and credit one of the alternative projections offered by Kolbrenner to determine a proper award. Accordingly, the Defendants' position that the evidence cannot support with reasonable certainty a finding of damages for tortious interference with contractual relations must be rejected.

3. ***Lost Profits and Goodwill***

With respect to TVT's claims for breach of contract and tortious interference with contractual relations, TVT seeks special damages for loss of goodwill. Goodwill is the intangible business value reflecting the basic human tendency of the consuming public—here, both album purchasers and artists, as well as other commercial entities—to do business with TVT. In this vein, the relevant evidence includes testimony and documents establishing the existence of advertisements indicating a

forthcoming CMC Album release by TVT in November 2002, and, clearly, the CMC Album has not yet been released or marketed. While the extent of the impact of missed release dates has been the subject of dispute, it is clear that TVT's assertion of some harm to its public image can reasonably be credited. For instance, the evidence includes testimony by Gottlieb of the loss of TVT's credit line as a result of the disruption of TVT's cash flow resulting from the CMC Album not being released as expected. Though Defendants presented evidence that TVT's goodwill and financial condition may have been impaired by difficulties and related litigation that one of its affiliated entities had faced with one of its lenders prior to the parties' dispute over the CMC Album, the principle of causation requires that Defendants' conduct be only a proximate cause of TVT's damage, not the only cause. Thus, a reasonable jury could find that even if TVT had already suffered some loss of goodwill from other events unrelated to the Defendants' wrongs here, the damage in question could have been substantially aggravated by Defendants' actions, or indeed that Defendants' conduct was a contributing cause or the actual cause of the harms in question. Moreover, the jury could also credit testimony that the financial difficulties and collateral litigation with the other lender referred to above pertained to and primarily affected not TVT but the affiliate entity that was actually involved.

Additionally, a jury can reasonably credit testimony by Gottlieb of damage to his business relationship with Gotti, a highly successful producer who is able to provide to business partners his own talent as well as that of other artists with whom he has relationships. A reasonable jury can also credit this testimony as a basis to conclude that TVT's general business reputation has suffered as a result of IDJ's and Cohen's interference and TVT's not having been able to release the particular product at issue, the CMC Album. Furthermore, a jury can rationally infer that the Defendants understood and should have foreseen such harm to TVT's goodwill throughout 2001-2002, the relevant time period

during which the acts of breach of contract and interference occurred, given the evidence of Defendants' own lengthy history and experience in the record business.

4. ***Fraud By Fraudulent Concealment***

Regarding TVT's claims for damages relating to fraud by fraudulent concealment, TVT is entitled to recover its out-of-pocket expenses corresponding to monies TVT expended by reason of its reliance on the Defendants' acts of concealment. Relevant evidence of such monies includes expenses incurred as advances to the artists pursuant to the Heads of Agreement, studio expenses paid by TVT for the recording of materials for the CMC Album, and advertising costs to promote the album. Accordingly, the Court concludes that the record allows for a determination of compensatory damages with reasonable certainty pursuant to TVT's claim of fraud by fraudulent concealment as against both Cohen and IDJ.

5. ***Copyright Infringement***

With respect to TVT's copyright infringement claims, the relevant evidence includes business records reflecting sales figures and revenues generated by the "Irv Gotti Presents: The Inc." CD and DVD. While the record includes some dispute as to the interpretation of these materials and to the amount of profits realized, if any, a jury can reasonably interpret these records as indicating the receipt of profits that can then be allocated to the infringed material as the jury rationally deems appropriate. Furthermore, with respect to "Get Tha Fortune," there is no reason to conclude that the jury would be unable to reasonably arrive at an appropriate damages figure within the statutory range set by the Copyright Act. For these reasons, IDJ's and Cohen's motions to dismiss TVT's claim for compensatory damages pursuant to IDJ's and Cohen's copyright infringement are denied.

C. *PUNITIVE DAMAGES*

1. *Malice and Recklessness or Gross, Wanton, or Willful Conduct*

Turning now to the matter of punitive damages, the Court begins by noting that the matter of the availability of such damages is not the proper subject of the present motion, and that matter has already been addressed elsewhere. With respect to the sufficiency of the evidence in support of punitive damages, the Court concludes that the record contains sufficient evidence to permit a reasonable jury to find that IDJ's and Cohen's actions were malicious and reckless or gross, wanton, or willful. Three series of activities predominantly support such a finding, in the Court's view.

First, the CMC Album project clearly presented IDJ and Cohen with a delicate business decision given their exclusivity relationships with Ja Rule and Gotti. Nonetheless, there is sufficient evidence from which a jury can reasonably conclude that the Defendants, without regard to the consequences for TVT, responded to this business development by deliberately subordinating TVT's contractual rights pursuant to the Heads of Agreement with the artists in order to placate the artists pending their contract renegotiations with IDJ, all the while never intending to satisfy their own representations of cooperation with and assent to the CMC Album project. Such evidence includes, among other things: a credibility analysis the jury must make as between the characterization of these events by Gottlieb and Cohen in light of the instances in which Cohen's trial testimony was impeached with his own prior statements; testimony of William Leibowitz ("Leibowitz"), TVT's counsel, who testified that he received assurances of IDJ's assent to the Side Letter Agreement from Jeffrey Kempler ("Kempler") and IDJ attorney William Lieberman, when taken together with both the lack of a response to TVT's November 15, 2001 so-called "reliance letter" by IDJ and IDJ's August 14, 2002 letter to Leibowitz purporting to reject the Side Letter Agreement (as though IDJ had never

assented to it); and the timing of this August 14, 2002 letter being delivered days after Ja Rule's contract had been renegotiated (Gotti's contract was renegotiated in late 2001 and through early 2002). Additional reasons are set forth in sections I.B and I.E of this Court's Decision and Order dated April 8, 2003, which discuss the sufficiency of the evidence supporting a finding of liability on TVT's claims of breach of contract against IDJ and fraud by fraudulent concealment against IDJ and Cohen in the context of the Defendants' prior Rule 50(a) motion during the liability phase of the trial of this matter.

Second, the evidence, including testimony by Kempler regarding IDJ's renegotiation of Ja Rule's services contract as well as the plain language of the amended contract itself and its various versions, can support a reasonable inference that, at least in and around August of 2002, IDJ led or encouraged the artists to obtain the CMC Album materials for release by IDJ rather than TVT. In addition, Gotti and others testified that in the first version of Ja Rule's "The Last Temptation" solo album Gotti produced for IDJ, he included or sought to include some of the songs that had been recorded and intended for the CMC Album, the production costs of which TVT had paid.

The third basis concerns the recent deliveries or attempts at delivery of materials for the CMC Album on February 26, 2003 and April 25, 2003, along with surrounding activities such as IDJ's waiver of exclusivity to the services of Ja Rule and Gotti first expressed to TVT by Cohen in late February and early March 2003. The parties dispute the significance of these transactions. IDJ and Cohen argue that these activities represent good faith cooperation and satisfaction of the Defendants' obligations to TVT. TVT claims that these actions, rather than reflecting any reasonable opportunity to mitigate, represent a continued pattern of coordinated litigation tactics designed to deprive TVT of due compensation while simultaneously denying TVT any meaningful benefit of the Heads of Agreement. In support of the latter interpretation, the

relevant evidence includes the date of the February 26, 2003 delivery being so close to the commencement of this trial's liability phase, as well as the April 25, 2003 delivery of updated CMC Album materials to Gottlieb's apartment on the Friday preceding the commencement of the damages phase on Monday April 28, 2003. Accordingly, particularly in light of the parties' prior dealings indicated by the record, not only can a jury reasonably reject the Defendants' argument, on this evidence, that TVT missed a reasonable opportunity to mitigate, but it can also, by the same reasoning, conclude that the Defendants' acts of purported delivery were in fact a continuation or extension of bad faith, self-serving tactics perpetrated at the continued expense of TVT.

In other words, a rational jury may construe these actions as continued efforts by the Defendants to frustrate TVT's contractual rights under the Heads of Agreement by forcing TVT to accept, under the guise of mitigation of damages, a rushed CMC Album with no meaningful opportunity by TVT to participate in or comment on its composition. A jury can therefore conclude that the public interest is furthered by punishing, and thus deterring, such conduct to protect the integrity of business dealings as well as to discourage manipulation of legal processes and forums the laws creates to fairly resolve civil disputes. Indeed, Cohen's equivocation during his damages phase testimony concerning his role in the breach of the Side Letter Agreement and interference with the Heads of Agreement, and his somewhat ambiguous explanation as to what he would have done differently, may be interpreted by a rational jury as evidence that he and IDJ would not be deterred from repeating such conduct in the future absent further penalty beyond compensatory damages.

These series of transactions—the apparent concealment of motives in 2001-2002, the renegotiation of Ja Rule's services contract with IDJ, and the recent deliveries of putative CMC Album materials—involved the actions of not only Cohen, Chairman of IDJ, but also, among others,

Kempler, IDJ's Senior Vice President of Business and Legal Affairs, who, for example, signed then crossed out his signature on the Side Letter Agreement and who later signed certain correspondence allegedly constituting or completing deliveries of CMC Album materials on the eve of the damages phase of trial. In this vein, corporate documents in evidence indicate that both Cohen and Kempler enjoy management control over the administrative and operational activities of Murder, Inc., in whose name the recent deliveries and surrounding actions occurred. The documentary and testimonial evidence establishing these overall activities could permit a jury reasonably to conclude that any malice and recklessness or any gross, wanton, or willful conduct discussed above could be attributed not only to Cohen but IDJ as well.

2. *Conduct Aimed at the Public Generally*

The Defendants dispute the sufficiency of TVT's evidence that Cohen's and IDJ's actions in question reflect a fraud not only upon TVT but also affecting the public generally. In the context of punitive damages awarded pursuant to TVT's claim for fraud by fraudulent concealment, a claim that the jury sustained during the liability phase, such an award need not be based on a showing of conduct aimed at the public generally. The case law to this effect is clear. [1]

Less clear is whether a public aim is necessary to award punitive damages pursuant to TVT's claim for breach of contract against IDJ, which the jury also sustained during the liability phase, when that claim involves, as here, an independently actionable tort in the form of a fraud. IDJ contests the propriety of punitive damages for breach of contract in this case on this basis, arguing that TVT has not presented competent evidence that the Defendant's wrongful conduct was directed at the public in general.

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[1] An illustrative list of cases establishing and applying this rule is set forth below at Appendix I.

During the Court's conferences with the parties regarding the proposed jury instructions and at the time Defendants initially made their Rule 50(a) motion, the Court voiced some doubts and reservations concerning whether a sufficient record existed to send this damages claim to the jury in light of the prerequisites, in particular, questions concerning the "public aim" element. The Court's doubts were grounded on uncertainties, confusion and contradiction it found in New York law in respect of this aspect of the requirements to support punitive damages for breach of contract. Some cases indicate that conduct directed at the public in general is required. Others suggest that the standard applies in the alternative to extraordinarily culpable behavior. Still other rulings have sustained such punitive damages awards absent any mention of such a prerequisite. None provides a precise definition or delimiting instructions as to what the public aim standard encompasses or guidance as to what it is designed to achieve.

Several leading New York Court of Appeals cases address this matter. *See New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 639 N.Y.S.2d 283, 662 N.E.2d 763 (1995); *Rocanova v. Equitable Life Assurance Society of the United States*, 83 N.Y.2d 603, 612 N.Y.S.2d 339, 634 N.E.2d 940 (1994); *Gordon v. Nationwide Mut. Ins. Co.*, 30 N.Y.2d 427, 334 N.Y.S.2d 601, 285 N.E.2d 849 (1972); *Walker v. Sheldon*, 10 N.Y.2d 401, 223 N.Y.S.2d 488, 179 N.E.2d 497 (1961). These decisions have at times been interpreted, both by New York courts and federal courts of this District and Circuit, as requiring, among other things, in addition to morally reprehensible, wanton dishonesty, conduct aimed at the public in general.[2] These same cases have been interpreted, again, by courts both of New York and of this District and Circuit, as requiring a showing of heightened morally reprehensible, wanton dishonesty *as an alternative*

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[2] An illustrative list of such cases is set forth below at Appendix II.

to a showing of a public aim.[3] The case law on the matter is thus quite divided,[4] and the task of reconciling these varying interpretations is formidable.

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[3] An illustrative list of such cases is set forth below at Appendix III.

[4] The posture of *Walker*, *Gordon*, *Rocanova*, and *New York University* and the language employed by the Court of Appeals in deciding these cases allow for such varying interpretations. For example, in *Walker*, the Court of Appeals noted that "there may be a recovery of exemplary damages in fraud and deceit actions where the fraud, aimed at the public generally, is gross and involves high moral culpability." 223 N.Y.S.2d 488, 179 N.E.2d at 498-99. But the Court of Appeals recognized the difficulty in formulating any categorical rule on the matter, explaining: "It may be difficult to formulate an all-inclusive rule or principle as to what is an appropriate case of the recovery of punitive damages, but it is our conclusion that the allegations of *the complaint before us*, if proved, would justify such an award. The pleading charges that defrauding the general public into entering publishing contracts, such as the one involved in the present case, was the very basis of the defendant's business. What is asserted is not an isolated transaction incident to an otherwise legitimate business, but a gross and wanton fraud upon the public." *Id.* 223 N.Y.S.2d 488, 179 N.E.2d at 499-500 (emphasis added).

In *Gordon*, the Court of Appeals stated that "the punitive nature of damage for the bad faith breach of contract is a characteristic of the law of contracts generally .... But a punitive measure of damages is not applied routinely for breach of contract; and bad faith requires an extraordinary showing of a disingenuous or dishonest failure to carry out a contract." 334 N.Y.S.2d 601, 285 N.E.2d at 854. While the relevant holding was based on the absence of bad faith rather than on any requirement of a public aim, *see id.* 334 N.Y.S.2d 601, 285 N.E.2d at 855, this case arose in the specific context of a breach of a contract for insurance coverage.

In *Rocanova*, the Court of Appeals elaborated the four-part formulation for punitive damages in breach of contract cases, including a public aim; however, the question of a public aim was not in dispute. Rather, the cause of action for breach of contract, and the attendant demand for punitive damages, was dismissed for failure to "state a claim of egregious tortious conduct directed at the [plaintiff]. Only then does an alleged pattern of bad-faith conduct attain legal significance insofar as it demonstrates that a public wrong would be vindicated by the award of punitive damages." 612 N.Y.S.2d 339, 634 N.E.2d at 945.

In *New York University*, the Court of Appeals dismissed the plaintiff's demand for punitive damages pursuant to a claim of breach of contract for failing to state a violation actionable as an independent tort, adding that "[i]n view of this disposition, we have no occasion to address the

In examining the matter, this Court has identified a narrower basis to reconcile the cases and resolve the uncertainties described as regards the case at bar. Whatever the import of the preceding authority treating the public aim standard either as an element in addition to morally reprehensible, wanton dishonesty or as an alternative to it, this Court construes a subset of the latter line of authority as establishing an exception to any presumed general rule requiring public aim rather than a basis for its abrogation.

In *Williamson, Picket, Gross, Inc. v. Hirschfeld*, 92 A.D.2d 289, 460 N.Y.S.2d 36 (1983), the State's Appellate Division First Department addressed the sufficiency of the complaint in an action to recover a real estate brokerage commission and punitive damages. The plaintiff represented a potential lessee of commercial space in a building owned by the defendant, and the complaint accused the defendant of withdrawing from an agreement to lease the premises to the plaintiff's client when another lessee, interested in a more lucrative lease of the entire building, emerged. The First Department sustained the plaintiff's demand for punitive damages for this breach of contract claim, explaining that "if [the defendant's] actions involve that degree of bad faith evincing a 'disingenuous or dishonest failure to carry out a contract,' ... punitive damages may be awarded." *Id.* at 41 (quoting *Gordon*, 334 N.Y.S.2d 601, 285 N.E.2d at 854).

Similarly, and more explicitly, the First Department addressed the same issue in *Aero Garage Corp. v. Hirschfeld*, 185 A.D.2d 775, 586 N.Y.S.2d 611 (1992), where the plaintiff was the successor lessee of a parking garage owned by the defendant and alleged breach of contract by the defendant for failing to obtain an extension of a certificate of occupancy as required by the lease, and for

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sufficiency of the complaint's claim for punitive damages under the remaining prongs of the *Rocanova* test [including the matter of public aim]." 639 N.Y.S.2d 283, 662 N.E.2d at 770.

interfering with the plaintiff's own efforts to obtain the certificate by opposing the plaintiff's application for a permit from the municipal agency. In this context, the First Department sustained an award of punitive damages, explaining:

> [W]e find the defendants' actions in this case "involve that degree of bad faith evincing a disingenuous or dishonest failure to carry out a contract" ... which justify the imposition of punitive damages. Defendants were fully aware *from the outset* that their actions were blatantly in breach of the agreement with plaintiff and yet displayed their willingness to go to any lengths to achieve their ends. We cannot agree ... [that the defendant] should not be penalized when it invoked the types of methods used here, including the *fully knowing and intentional breach of unambiguous contractual provisions*, the flouting of court ordered injunctions and the bad faith institution of administrative proceedings.

Id. at 612 (citations omitted; emphasis added; internal quotations) (quoting *Gordon*, 334 N.Y.S.2d 601, 285 N.E.2d at 854, and *Williamson*, 460 N.Y.S.2d at 41). These cases are indicative of a distinct branch of authority repeatedly reiterated and applied by the courts of New York and of this District and Circuit.[5]

Apart from the debate over whether, as a categorical matter, sufficiently egregious moral culpability or wanton dishonesty can obviate the public aim requirement to support an award of punitive damages in a breach of contract action, these cases present a narrow exception to what appears to be an otherwise general requirement that some form of public rights be implicated in a defendant's wrongs. That exception can be fairly characterized along the following lines: absent conduct directed at the public in

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[5] An illustrative list of such cases is set forth below at Appendix IV.

general, punitive damages may be available in a breach of contract claim where the plaintiff establishes a sufficiently high degree of bad faith by the defendant evincing disingenuous or dishonest failure to carry out contractual obligations, thus frustrating the plaintiff's rights to an aggravated extent, particularly where bad faith is apparent at or near the outset of the transaction and where the breached obligations are unambiguous.

This is precisely the situation in the case at bar. By finding IDJ and Cohen liable for fraud,[6] the jury accepted TVT's argument that the Defendants concealed their intent not to carry out their contractual obligations, despite representations of assent to the Side Letter Agreement—representations established implicitly in the jury's findings of liability pursuant to TVT's breach of contract claim—in order to placate Gotti and, later, Ja Rule, pending IDJ's impending contract renegotiations with the artists.[7] Indeed, Cohen characterized his feelings and activities regarding the CMC Album project during 2001 and 2002 as "ambivalent" and "wishy-washy" repeatedly during his damages phase testimony, (*see e.g.*, Trial Transcript, Damages Phase, at 303-305), and such ambivalence apparently never solidified into a definitive stance until August 14, 2002, days after Ja Rule's contract renegotiations had concluded (Gotti's contract renegotiations concluded in early 2002), when IDJ sent a letter to TVT's counsel purporting finally to reject the Side Letter Agreement.

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[6] In a Decision and Order dated April 8, 2003, this Court rejected Defendants' motion for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure addressing the evidence adduced during the liability phase of this trial. Accordingly, the Court concluded that the evidence on record was sufficient to support a finding of liability pursuant to TVT's claim of fraud by fraudulent concealment against IDJ and Cohen. (Decision and Order dated April 8, 2003 at 10-12.)

[7] The jury's finding of willfulness with regard to TVT's allegations of copyright infringement as against IDJ and Cohen further evinces reasoning to this effect by the jury.

This finding of fraud, and its implications as expounded above, establishes a dishonest or disingenuous intention not to carry out contractual obligations from at or near the outset of the parties' dealings in this matter, and bases for a rational finding of aggravated bad faith are delineated in the discussion set forth in section I.C(1) *infra*. Furthermore, for reasons discussed throughout this Decision and Order, and particularly in sections I.B(1), I.B(3), and I.C(1) *infra*, it is clear that IDJ's and Cohen's actions frustrated TVT's contractual right to release and exploit the CMC Album, harming TVT as a result. Finally, the contractual obligation to consent is unambiguous here, and, indeed, no argument of ambiguity on the matter has ever been raised by the parties. For these reasons, the Court concludes that a showing of harm to the general public is not required as an element of punitive damages in this case.

Even though, on the preceding legal analysis as applied to the facts of this case, a showing of conduct aimed at the public generally is not a necessary element to sustain a punitive damages award pursuant to TVT's claims of breach of contract and fraud, the Court notes in this regard the following events and supporting evidence, among others. First, as already discussed, a jury could rationally find indignant and morally reprehensible the recent pattern of deliveries of putative CMC Album materials first on February 26, 2003 and then again on April 25, 2003 (along with certain surrounding and intervening correspondences on the matter), which the jury rationally could interpret to be not a good faith effort to mitigate damages but a pattern of continued malice and an illustration of utter disregard for the rules and procedures contemplated by the judicial process for fairly resolving private disputes. While these actions are not what constitute the underlying breach of contract or fraud, they do directly arise out of the wrongdoings forming the heart of the present dispute, and, as previously indicated, they rationally could be construed by a reasonable jury as ongoing, self-serving efforts by the Defendants to frustrate TVT's contractual rights under the

Heads of Agreement by forcing upon TVT a hurriedly created CMC Album without meaningful participation by TVT. To the extent that these actions implicate the judicial process, they can rationally be construed as implicating a public institution and, therefore, as being directed at the public generally, should the jury credit them in accordance with the evidence and arguments presented by TVT. *See e.g., Aero Garage*, 586 N.Y.S.2d at 613 (recognizing bad faith manipulation of administrative proceedings as a factor in support of punitive damages for breach of contract).

Second, the public generally has an interest in the creation and dissemination of works of art and the encouragement and protection of artistic and intellectual labor—vital interests reflected at the heart of several constitutional and statutory prescriptions. *See generally* U.S. Const. art. I, § 8, cl. 8 ("The Congress shall have the Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries ...."); U.S. Const. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press ...."); the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*; *Estate of Ernest Hemmingway v. Random House, Inc.*, 23 N.Y.2d 341, 296 N.Y.S.2d 771, 244 N.E.2d 250, 255 (1968) (recognizing in federal and New York law an interest in protecting speech and granting copyrights "to encourage and protect intellectual labor."); *Straus v. Am. Publishers' Assoc.*, 177 N.Y. 473, 69 N.E. 1107, 1107-1109 (1904) (recognizing public interest in nurturing and promoting the pursuit and creation of the arts). The public generally is impacted by Cohen's and IDJ's wrongdoings insofar as their actions impaired the creation and dissemination of a work of art that TVT intended to sell to the general public and which it had already advertised to the public at large. *See Licette Music Corp. v. A.A. Records, Inc.*, 196 A.D.2d 467, 601 N.Y.S.2d 297, 297-98 (1993) (sustaining punitive damages award for breach of contract and fraud claims where music distributor licensee deceptively camouflaged

public sales to avoid royalty payments); *Hauser v. Harcourt Brace Jovanovich, Inc.*, 140 Misc.2d 82, 530 N.Y.S.2d 431, 434 (1988) ("Plaintiff's claim that defendants' conduct was outrageous and wanton and has interfered with the public's right to buy and read his book is sufficient on its face ....").

3. ***The Awards***

For these reasons, the Court concludes that a sufficient showing of malice and recklessness or gross, wanton, or willful conduct has been established to permit a reasonable jury to award punitive damages pursuant to tortious interference with contractual relations and copyright infringement of "Get Tha Fortune." The same conclusion applies regarding TVT's breach of contract and fraud claims because, for the reasons indicated, a showing of conduct aimed at the public generally is not a necessary element on the facts of this case, though even if it were, the evidence, for the reasons indicated, would satisfy such a requirement. Therefore, Cohen's and IDJ's motions to dismiss TVT's claims for punitive damages are denied.

4. ***Cohen as a Corporate Officer***

Finally, the Court notes that Cohen's argument that punitive damages are legally insufficient as against him because TVT's proof fails to overcome the distinction between a corporation and its officer is not properly within the purview of the present motion under Rule 50(a) arising out of the damages phase of this litigation.

II. *CONCLUSION AND ORDER*

For the reasons stated above, it is hereby

ORDERED that the Defendants' motion for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure is denied.

SO ORDERED.

APPENDIX

I. CASES HOLDING THAT CONDUCT AFFECTING PUBLIC RIGHTS OR AIMED AT THE PUBLIC GENERALLY IS NOT A NECESSARY ELEMENT TO PUNITIVE DAMAGES IN CONNECTION WITH LIABILITY FOR FRAUD

Ostano Commerzanstalt v. Telewide Sys., Inc., 880 F.2d 642, 649 (2d Cir.1989) ("Nor do we agree that there must be acts aimed at the public to support an award of punitive damages in a fraud case. Rather, punitive damages may be awarded when fraud is gross, wanton, or willful, whether or not directed at the public generally." (citing *Borkowski*, 387 N.Y.S.2d 233, 355 N.E.2d at 287)).

Whitney v. Citibank, N.A., 782 F.2d 1106, 1118 (2d Cir.1986) ("Under New York law, by which we are governed in this diversity suit, punitive or exemplary damages may be awarded where the defendant's conduct amounts to such gross, wanton or willful fraud, dishonesty, or malicious wrongdoing as to involve a high degree of moral culpability, making it appropriate to deter the defendants from engaging in similar conduct in the future and to induce the victim to take action against the wrongdoer. ... Proof of acts aimed at the public generally is not required ...." (citation omitted) (citing *Borkowski*, 387 N.Y.S.2d 233, 355 N.E.2d at 287)).

Aldrich v. Thomson McKinnon Sec., Inc., 756 F.2d 243, 248 n. 5 (2d Cir.1985) ("Though we need not decide the issue, we note that the New York Court of Appeals has suggested that the showing of a fraud on the public is no longer a prerequisite to the award of punitive damages." (citing *Borkowski*, 387 N.Y.S.2d 233, 355 N.E.2d at 287)).

Doehla v. Wathne Ltd., Inc., No. 98 Civ. 6087 (CSH), 2000 WL 987280, at *9 (S.D.N.Y. July 17, 2000) ("While there is no requirement that the fraud be aimed at the general public to recover punitive damages, plaintiffs must plead and prove that defendants engaged in gross, wanton, or willful fraud or other morally capable [sic] conduct." (citations omitted; internal quotations omitted)).

Blank v. Baronowski, 959 F.Supp. 172, 179 (S.D.N.Y.1997) ("Under New York law, punitive damages are allowable in tort cases involving claims for fraud, breach of fiduciary duty or tortious interference with contract even if there is no harm aimed at the general public so long as the very high threshold of moral culpability is satisfied." (citation omitted; internal quotations omitted)).

Giblin v. Murphy, 73 N.Y.2d 769, 536 N.Y.S.2d 54, 532 N.E.2d 1282, 1284 (1988) ("Nor can we accept defendants' argument that the punitive damages award must be overturned because there was no harm aimed at the public generally. Punitive damages are allowable in tort cases such as this so long as the very high threshold of moral culpability is satisfied ....").

Borkowski v. Borkowski, 39 N.Y.2d 982, 387 N.Y.S.2d 233, 355 N.E.2d 287, 287 (1976) ("It is not essential, as the Appellate Division stated, that punitive damages be allowed in a fraud case only where the acts had been aimed at the public generally.").

Blakeslee v. Rabinor, 182 A.D.2d 390, 582 N.Y.S.2d 132, 134 (1992) ("Originally, punitive damages were recoverable in fraud actions only where the fraud was aimed at the general public, was gross and wanton in nature and involved high moral culpability. ... However, [the Court of Appeals has since] declared that it is 'not essential ... that punitive damages be allowed in a fraud case only where the acts had been aimed at the public generally.' " (quoting *Borkowski*, 387 N.Y.S.2d 233, 355 N.E.2d at 287).)

V.J.V. Transp. Corp. v. Santiago, 173 A.D.2d 537, 570 N.Y.S.2d 138, 139 (1991) ("[I]t is not necessary to prove that the fraud was aimed at the public generally in order to justify an award of punitive damages.").

II. CASES IN WHICH THE STANDARD COURTS APPLIED TO DETERMINE THE APPROPRIATENESS OF AN AWARD OF PUNITIVE DAMAGES IN CONNECTION WITH A BREACH OF CONTRACT CLAIM REQUIRED CONDUCT THAT BOTH DISPLAYS A HIGH DEGREE OF MORAL CULPABILITY AND IS DIRECTED AT THE PUBLIC GENERALLY

United States v. Merritt Meridian Constr. Corp., 95 F.3d 153, 160 (2d Cir.1996) ("Generally, punitive damages are not available for a breach of contract. However, where the breach of contract also involves a fraud evincing a high degree of moral turpitude and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, punitive damages are recoverable if the conduct was aimed at the public generally," (citations omitted; internal quotations omitted)).

Durham Indus., Inc. v. The North River Ins. Co., 673 F.2d 37, 40 (2d Cir.1982) ("However, under New York law, punitive damages may not be awarded in breach of contract cases, which involve a private wrong and where no public rights are involved." (citations omitted)).

New Paradigm Software Corp. v. New Era of Networks, Inc., 107 F.Supp.2d 325, 332 (S.D.N.Y.2000) ("[A] private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally." (citations omitted; internal quotations omitted)).

The City of New York v. Coastal Oil New York, Inc., No. 96 Civ. 8667 (RPP), 1999 WL 493355, at *14 (S.D.N.Y. July 12, 1999) (construing New York Court of Appeals holdings as "inconsistent with the proposition that egregious tortious conduct can support an award of punitive damages without an additional finding that the conduct was directed at the public generally." (citations omitted)).

RNB Garments Philippines, Inc. v. Lau, No. 98 Civ. 4561 (DLC), 1999 WL 223153, at *6 (S.D.N.Y. April 16, 1999) ("Where the gravamen of a lawsuit is a breach of contract, punitive damages are only available when necessary to vindicate a public right." (citation omitted)).

Baxter Diagnostics, Inc. v. Novatek Medical, Inc., No. 94 Civ. 5220 (AJP), 1998 WL 665138, at *2 (S.D.N.Y. Sept.25, 1998) ("However, where the breach of contract also involves a fraud evincing a high degree of moral turpitude and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, punitive damages are recoverable if the conduct was aimed at the public generally." (citations omitted; internal quotations omitted)).

Kunica v. St. Jean Fin., Inc., No. 97 Civ. 3804 (RWS), 1998 WL 437153, at *8 (S.D.N.Y. Aug.3, 1998) ("However, where the breach of contract also involves a fraud evincing a high degree of moral turpitude and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, punitive damages are recoverable if the conduct was aimed at the public generally." (citations omitted; internal quotations omitted)).

Parke-Hayden, Inc. v. Loews Theatre Mgmt. Corp., 789 F.Supp. 1257, 1267 (S.D.N.Y.1992) ("[P]unitive damages may not be awarded in breach of contract cases, unless the wrong is aimed at the public generally." (citations omitted)).

Avnet, Inc. v. Am. Motorists Ins. Co., 684 F.Supp. 814, 816 (S.D.N.Y.1988) ("To sustain its claim for punitive damages ... plaintiff must set forth sufficient evidentiary allegations of ultimate facts pointing to a fraudulent scheme upon the public." (citations omitted; internal quotations omitted)).

Purdy v. Consumers Distrib. Co., 648 F.Supp. 980, 981 (S.D.N.Y.1986) (requiring "a showing of wanton dishonesty as to imply a criminal indifference to civil obligations—morally culpable conduct directed at the general public, a public as opposed to a mere private wrong." (citations omitted; internal quotations omitted)).

Colton, Hartnick, Yamin and Sheresky v. Feinberg, 227 A.D.2d 233, 642 N.Y.S.2d 283, 283 (1996) ("Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights." (citation omitted; internal quotations omitted)).

Bibeau v. Ward, 228 A.D.2d 943, 645 N.Y.S.2d 107, 110 (1996) ("Punitive damages may be recoverable under a breach of contract claim; however, such damages are limited to those instances where it is necessary to vindicate a public right." (citations omitted; internal quotations omitted)).

Murray-Gardner Mgmt. Inc. v. Iroquois Gas Transmission Sys. L.P., 229 A.D.2d 852, 646 N.Y.S.2d 418, 420 (1996) ("Likewise, plaintiff's request for punitive damages was properly dismissed in the absence of a showing by plaintiff that defendant engaged in egregious tortious conduct toward it that was part of a pattern directed at the public generally." (citations omitted)).

Supreme Auto. Mfg. Corp. v. Cont'l Cas. Co., 126 A.D.2d 153, 512 N.Y.S.2d 820, 822 (1987) (requiring "a showing of wanton dishonesty as to imply a criminal indifference to civil obligations—morally culpable conduct directed at the general public, a public as opposed to a mere private wrong." (citations omitted; internal quotations omitted)).

Samovar of Russia Jewelry Antique Corp. v. Generali, 102 A.D.2d 279, 476 N.Y.S.2d 869, 872 (1984) (same).

Katz v. The Dime Sav. Bank, FSB, 992 F.Supp. 250, 253-54 (W.D.N.Y.1997) (questioning the continuing validity of *Aero Garage* but dismissing plaintiff's demand for punitive damages in breach of contract because "[h]is complaint does not allege *any* public wrong, moral turpitude, *or* wanton dishonesty." (emphasis added)).

III. CASES IN WHICH THE STANDARD THE COURTS APPLIED TO DETERMINE THE APPROPRIATENESS OF AN AWARD OF PUNITIVE DAMAGES IN CONNECTION WITH A BREACH OF CONTRACT CLAIM REQUIRED CONDUCT EXHIBITING A PARTICULARLY HIGH DEGREE OF MORAL CULPABILITY AS AN ALTERNATIVE TO CONDUCT DIRECTED AT THE PUBLIC GENERALLY

Action S.A. v. Marc Rich & Co., 951 F.2d 504, 509 (2d Cir.1991) (in sustaining punitive damages award arising from default judgment on a complaint asserting claims for, among other things, breach of contract and fraud, the Second Circuit explained: "Under New York law, punitive damages are appropriate in cases involving gross, wanton, or willful fraud or other morally culpable conduct.... Such conduct need not be directed at the general public." (citations omitted; internal quotations omitted)).

Brink's Inc. v. The City of New York, 717 F.2d 700, 704-705 (2d Cir.1983) (Second Circuit sustained an award of punitive damages where negligence and breach of contract claims "were interlaced with one another and essentially rested upon the same conduct ... [and where] negligence by one contracting party caus[ed] injury to the other," and noted, in so doing, that "New York law does not preclude the award of punitive damages where conduct that gives rise to a contract action is also tortious." (citations omitted; internal quotations omitted)).

Ladenburg Thalmann & Co. Inc. v. Imaging Diagnostic Sys., Inc., 176 F.Supp.2d 199, 207 (S.D.N.Y.2001) ("[T]o be awarded punitive damages for breach of contract, a party must show that: such damages are necessary to vindicate a public right; the misconduct is egregious and may be characterized as gross and morally reprehensible; *or* the misconduct involved such wanton dishonesty as to imply a criminal indifference to civil obligations." (citation omitted; emphasis added; internal quotations omitted)).

Wright v. Carleton Coll., No. 00 Civ. 3335 (AKH), 2000 WL 1474408, at *3 (S.D.N.Y.2000) ("Under New York law, punitive damages are not available in actions for breach of contract unless *either* (1) the wrong is aimed at the public generally, *or* (2) there is an extraordinary showing of dishonesty or bad faith." (citations omitted; emphasis added; internal quotations omitted)).

Lovely Peoples Fashion, Inc. v. Magna Fabrics, Inc., No. 95 Civ. 8450(AGS)(THK), 1998 WL 422482, at *8 (S.D.N.Y. July 22, 1998) ("Under New York law, punitive damages may be recovered on a breach of contract claim in only limited circumstances: where they are necessary to vindicate a public right; where a defendant has engaged in egregious conduct that can be characterized as gross and morally reprehensible; *or* where a defendant's conduct may be characterized by such wanton dishonesty as to imply a criminal indifference to civil obligations." (citations omitted; emphasis added; internal quotations omitted)).

Bonnie & Co. v. Bankers Trust Co., 945 F.Supp. 693, 715 (S.D.N.Y.1996) ("[P]unitive damages are an appropriate remedy in a breach of contract action only where they are necessary to vindicate a public right ... *or* where a defendant has engaged in such wanton dishonesty as to imply a criminal indifference to civil obligations." (citations omitted; emphasis added; internal quotations omitted)).

Jackson v. Kump, No. 93 Civ. 3519 (LMM), 1994 WL 9691, at *6 (S.D.N.Y. Jan. 13, 1994) ("In New York, however, even where a public right is not at issue, punitive damages might be available for breach of contract.").

Baker v. Combe Inc., No. 90 Civ. 5587 (RLC), 1991 WL 183728, at *3 (S.D.N.Y. Sept.10, 1991) ("Punitive damages may be awarded in a breach of contract case only where a defendant has engaged in wrongdoing involving fraudulent behavior directed toward the public generally *or* involving high moral turpitude implying criminal indifference to a civil obligation." (citations omitted; emphasis added)).

Banco Nacional de Costa Rica v. Bremar Holdings Corp., 492 F.Supp. 364, 374 (S.D.N.Y.1980) ("We conclude

that today, a plaintiff suing for fraud or breach of contract under New York law can recover punitive damages even though the fraud involved was not 'aimed at the public generally.' ").

Halpin v. Prudential Ins. Co. of Am., 48 N.Y.2d 906, 425 N.Y.S.2d 48, 401 N.E.2d 171, 171-72 (1979) ("Inasmuch as plaintiff's action is grounded upon private breach of contract, and does not seek to vindicate a public right *or* deter morally culpable conduct, punitive damages are not recoverable." (citations omitted; emphasis added)).

Ciraolo v. Miller, 138 A.D.2d 443, 525 N.Y.S.2d 861, 862 (1988) ("It is well established that in an action grounded upon private breach of contract, punitive damages may not be awarded. Only when the fraudulent behavior is directed toward the public generally *or* involves allegations of high moral turpitude so as to imply criminal indifference to a civil obligation is an award of punitive damages proper." (citations omitted; emphasis added; internal quotations omitted)).

Minjak Co. v. Randolph, 140 A.D.2d 245, 528 N.Y.S.2d 554, 557-58 (1988) ("The determining factor is not the form of the action but the moral culpability of the defendant, and whether the conduct implies a criminal indifference to civil obligations." (citation omitted; internal quotations omitted)).

Home Ins. Co. of Indiana v. Karantonis, 124 A.D.2d 368, 507 N.Y.S.2d 489, 490 (1986) ("Inasmuch as defendants' counterclaim is grounded upon private breach of contract and does not seek to vindicate a public right *or* deter morally culpable conduct, punitive damages are not recoverable." (citation omitted; emphasis added)).

Kwatinetz v. JWP, Inc., No. Civ. 86-3069, 1988 WL 70148, at *2 (E.D.N.Y. June 6, 1988) ("Under New York law, absent an allegation of fraud aimed against the public *or* morally culpable conduct, punitive damages cannot be recovered in a breach of contract action." (citations omitted; emphasis added)).

IV. CASES IN WHICH THE STANDARD COURTS APPLIED TO DETERMINE THE APPROPRIATENESS OF AN AWARD OF PUNITIVE DAMAGES IN CONNECTION WITH A BREACH OF CONTRACT CLAIM UNDER PARTICULAR CIRCUMSTANCES MADE NO MENTION OF THE "PUBLIC AIM" FACTOR OR INDICATED THAT SUCH AN ELEMENT IS NOT REQUIRED

New Spectrum Realty Servs., Inc. v. The Nature Co., 42 F.3d 773, 777 (2d Cir.1994) (Second Circuit acknowledged the availability of punitive damages under New York law in cases of "willful frustration of [a plaintiff's] rights under an unambiguous contract," but holding that this doctrine did not apply to the facts of the case before it (discussing *Aero Garage*)).

Ostano Commerzanstalt v. Telewide Sys., Inc., 880 F.2d 642, 649 (2d Cir.1989) (without requiring a showing of public aim, the Second Circuit upheld an award of punitive damages in a breach of contract action because "[the individual defendant] *entered the transaction* with the clear and blatant intent to defraud." (citation omitted; emphasis added));

Brink's Inc. v. The City of New York, 717 F.2d 700, 704-705 (2d Cir.1983) (Second Circuit sustained an award of punitive damages where negligence and breach of contract claims "were interlaced with one another and essentially rested upon the same conduct ... [and where] negligence by one contracting party caus[ed] injury to the other," and noted, in so doing, that "New York law does not preclude the award of punitive damages where conduct that *gives rise* to a contract action is also tortious." (citations omitted; emphasis added; internal quotations omitted)).

Miller v. European Am. Bank, 921 F.Supp. 1162, 1167 (S.D.N.Y.1996) ("Punitive damages are generally not recoverable under actions for breach of contract ... unless the defendant's actions involve a degree of bad faith

evincing a disingenuous or dishonest failure to carry out a contract." (citations omitted; internal quotations omitted)).

Career Initiatives Corp. v. Palmer, 893 F.Supp. 295, 296 (S.D.N.Y.1995) ("Under New York law, punitive damages are not available in breach of contract actions, unless the wrong is aimed at the public generally. ... The only *exception to this rule* exists in cases where there is an extraordinary showing of a disingenuous or dishonest failure to carry out a contract." (citations omitted, emphasis added; internal quotations omitted)).

Ox v. The Union Cent. Life Ins. Co., No. 94 Civ. 4754 (RWS), 1995 WL 296541, at *6 (S.D.N.Y. May 15, 1995) ("New York courts have traditionally held that punitive damages are not available in cases of simple breach of contract. ... An *exception* to this has been enunciated for those cases that involve a degree of bad faith that evinces disingenuous or dishonest failure to carry out a contract." (citations omitted; emphasis added)).

Jackson v. Kump, No. 93 Civ. 3519 (LMM), 1994 WL 9691, at *6 (S.D.N.Y. Jan. 13, 1994) ("In New York, however, even where a public right is not at issue, punitive damages might be available for breach of contract." (discussing *Aero Garage*)).

AML Int'l Ltd. v. Orion Pictures Corp., No. 89 Civ.2048 (KMW), 1991 WL 120323, at *4 (S.D.N.Y. June 24, 1991).

Gordon v. Nationwide Mut. Ins. Co., 30 N.Y.2d 427, 334 N.Y.S.2d 601, 285 N.E.2d 849, 854 (1972) ("[T]he punitive nature of damage for the bad faith breach of contract is a characteristic of the law of contracts generally .... But a punitive measure of damages is not applied routinely for breach of contract; and bad faith requires an extraordinary showing of a disingenuous or dishonest failure to carry out a contract.").

Suffolk Sports Center, Inc. v. Belli Constr. Corp., 212 A.D.2d 241, 628 N.Y.S.2d 952, 956 (1995) ("[The defendant's] actions involve that degree of bad faith evincing a disingenuous or dishonest failure to carry out [the parties'] contract so as to justify the imposition of punitive damages

.... In this regard, we note that, although [the defendant's] actions were not specifically directed at the public, nevertheless an award of punitive damages is appropriate ...." (citations omitted; internal quotations omitted)).

Cross v. Zyburo, 185 A.D.2d 967, 587 N.Y.S.2d 670, 671 (1992) ("The instant record reveals that the transaction in question was merely a private one between the plaintiff and defendants. Therefore, in order to sustain a demand for punitive damages for a breach of contract, the plaintiff must show that the defendants' actions involved a degree of bad faith evincing a disingenuous or dishonest failure to carry out a contract." (citations omitted; internal quotations omitted)).

Desai v. Blue Shield of Northeastern New York Inc., 178 A.D.2d 894, 577 N.Y.S.2d 932, 934 (1991) ("[W]here, as here, a plaintiff's claim for punitive damages is premised upon breach of contract, such damages are not recoverable absent an extraordinary showing of a disingenuous failure by the defendant to carry out its contract" (citation omitted)).

The City of Amsterdam v. Daniel Goldreyer, Ltd., 882 F.Supp. 1273, 1284 (E.D.N.Y.1995) ("However, the applicability of punitive damages in breach of contract actions is not limited to public rights.... Plaintiff ... has properly alleged that Defendants knowingly misrepresented their actions with the intent to deceive." (citations omitted)).

Hudson Motors P'ship v. Crest Leasing Enters., Inc., 845 F.Supp. 969, 974-75 (E.D.N.Y.1994) ("If the wrong associated with the breach is not aimed at the public, but the actions of the breaching party involve that degree of bad faith evincing a disingenuous or dishonest failure to carry out a contract, ... then punitive damages are appropriate." (citations omitted; internal quotations omitted)).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TVT RECORDS and TVT Music, Inc.,
Plaintiffs,

v.

The ISLAND DEF JAM MUSIC GROUP and Lyor Cohen,
Defendants

The Island Def Jam Music Group, A Division of UMG Recordings, Inc.,
Counterclaimant,

v.

TVT Records, Inc. and Steve Gottlieb,
Counterclaim-Defendants.

No. 02 CIV. 6644(VM).

Sept. 2, 2003

DECISION AND ORDER

MARRERO, District Judge.

I. BACKGROUND

On August 20, 2002, plaintiffs TVT Records and TVT Music, Inc. (collectively "TVT") commenced this action against defendants The Island Def Jam Music Group ("IDJ") and its chairman Lyor Cohen ("Cohen," and collectively with IDJ, the "Defendants"), alleging copyright infringement and related state law claims arising out of the production of a certain music album. The Court held an evidentiary hearing on September 23, 24, and 30, 2002, after which it granted in part and denied in part TVT's motion for a preliminary

injunction essentially prohibiting any use of disputed album materials pending final resolution of the surrounding issues, including ownership, at trial. Trial of the parties' dispute commenced on March 10, 2003 in bifurcated liability and damages phases before the same jury. On March 21, 2003, the jury returned a verdict of liability against IDJ for breach of contract and against both Defendants for tortious interference with contractual relations, fraud by fraudulent concealment, and willful copyright infringement. The jury assessed compensatory and punitive damages on May 6, 2003 at the damages phase in the aggregate amount of approximately $132 million. [1]

Now before the Court are the Defendants' post-trial motions for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b) and for a new trial and/or remittitur pursuant to Fed.R.Civ.P. 59. Also before the Court are TVT's motions for return, recall, and destruction of master recordings and infringing materials pursuant to § 503(b) of the Copyright Act of 1976 (the "Copyright Act"), 17 U.S.C. § 101 *et seq.*, and for the setting of the date for accrual of prejudgment interest.[2] For the reasons discussed below, Defendants' motions for judgment as a matter of law are DENIED, Defendants' motions for a new trial are DENIED, TVT's motion for the return, recall, and destruction of infringing materials is GRANTED IN PART

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[1] TVT elected to receive, with respect to the jury's finding of copyright infringement of "Get Tha Fortune," the statutory damages award determined by the jury as an alternative to actual damages, profits, and punitive damages on this claim.

Additionally, as indicated in the main text, the liability phase of the trial of this matter occurred from March 10, 2003 through March 21, 2003, and the damages phase occurred from April 28, 2003 through May 6 2003. References to the trial record of the liability phase in the present Decision and Order appear as "Liability Tr.," and references to the damages phase appear as "Damages Tr."

[2] TVT's motion for attorneys' fees will be addressed separately to allow for any appropriate consideration of resources expended in regards to the Defendants' post-trial motions.

and DENIED IN PART, and TVT's motion for the setting of the date for accrual of interest is GRANTED. Defendants' motions for remittitur are addressed in a separate Decision and Order, issued as *TVT Records v. The Island Def Jam Music Group*, 279 F.Supp.2d 413, 2003 WL 22056308, No. 02 Civ 6644, slip op. (S.D.N.Y.2003), and accompanying this ruling.

II. FACTS [3]

This case arises from a licensing dispute between TVT and its principal Steve Gottlieb ("Gottlieb") and IDJ concerning the distribution and exploitation of musical works created in significant part by Jeffrey Atkins, who is professionally known as Ja Rule ("Ja Rule"), and produced by Irving Lorenzo, who is professionally known as Irv Gotti ("Gotti," and together with Ja Rule, the "Artists"). Under an agreement dated March 2, 1998 between IDJ's predecessor-in-interest, Rush Associated Recordings, and Ja Rule, which was extended by an agreement dated August 16, 2003 between IDJ and Ja Rule, IDJ is entitled to Ja Rule's exclusive services as a recording artist. Pursuant to an agreement dated February 11, 1999 between IDJ's predecessor-in-interest, Island/Mercury Records, and Gotti, which was extended by an agreement dated December 17, 2001 between IDJ and Gotti, IDJ is entitled to Gotti's exclusive services as a record producer and talent-finder.

In an agreement entitled "Heads of Agreement Between Murderers Inc./Irv Gotti And Jeffrey Atkins (p/k/a 'Ja Rule') And Tee Vee Toons, Inc. ('TVT')" dated July 2, 2001 (the "Heads of Agreement"), TVT contracted with Ja Rule and Gotti—and Gotti's company, Murder Inc. ("Murder Inc.")—to record, produce, and exploit an album (the "CMC Album") featuring the performances of Ja Rule, Christopher

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[3] The factual recitation presented herein is intended to be a general summary of the jury's findings as reflected in its verdict, noting in the process some of the more salient evidence and events. It is of course not exhaustive of all the issues surrounding the parties' dispute or the evidence introduced at trial.

Bristole, and Otha Miller (collectively the "CMC Artists").[4] Under the Heads of Agreement, four previously recorded CMC tracks would be reworked and supplemented with at least eight newly recorded tracks featuring the CMC Artists, including Ja Rule, to comprise the CMC Album. The Heads of Agreement, through various guarantees and indemnities, charges the Artists with securing any approvals, consents, and permissions necessary for them to satisfy their obligations under this contract.

The delivery date for the new recordings as contemplated by the written Heads of Agreement was November 1, 2001. This delivery date was later changed to reflect the schedules of the Artists and the timing of other contemplated album releases. TVT and the Artists ultimately agreed that the new tracks would be supplied to TVT in time for release in November 2002. In the interim, the Artists continued to work on the new recordings for the CMC Album, and by May 2002, approximately eleven new tracks had been recorded. During this time, TVT continued to pay the Artists' recording costs, the CMC Album and its fall 2002 release were publicized by both TVT and Gotti, as well as by IDJ's publishing affiliate, and TVT arranged and paid for a photo shoot for the Artists to further promote the CMC Album. Also during this interim time, Gotti's contract with IDJ was renegotiated in late 2001, and Ja Rule's contract with IDJ was renegotiated in early to mid-August of 2002.

TVT recognized that IDJ's assent to the project envisioned by the Heads of Agreement was necessary, and it accordingly endeavored to negotiate for IDJ's consent in

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[4] In 1994, Ja Rule, Bristole, and Miller performed together as a group known as Cash Money Click ("CMC") under contract with TVT. The group discontinued recording soon thereafter when Bristole was incarcerated. In 2001, after Bristole's release from prison, Ja Rule, motivated at least in part by a desire to assist Miller's and Bristole's career development, agreed to record a new album comprised of performances of these artists reunited again as CMC. Miller and Bristole had remained under contract with TVT.

mid-to-late 2001. In the process, Cohen and Gottlieb outlined a profit sharing arrangement. Gottlieb testified that in personal negotiations between them, Cohen gave his verbal approval to the terms and that Gottlieb understood that the parties had then concluded a binding agreement. In a letter dated October 22, 2001, William Leibowitz ("Leibowitz"), outside counsel for TVT, sent to IDJ, asking that they be signed and returned, execution copies of what TVT understood to be the written embodiment of an agreement, termed the Side Letter Agreement (the "Side Letter Agreement"), in which IDJ consented to permit its exclusive Artists to contribute to the CMC Album project. TVT's evidence indicates that IDJ representatives repeatedly assured Leibowitz that IDJ had consented to the CMC Album project and that executed copies of the Side Letter Agreement would be supplied. In a letter dated November 15, 2001, Leibowitz again asked IDJ to return executed copies of the Side Letter Agreement, indicating that TVT had relied on representations of consent and assurances that executed copies would be forthcoming.

In the spring of 2002, Leibowitz spoke with Brian Robinson of IDJ's legal department about the Side Letter Agreement and IDJ's prior assurances, and Robinson indicated that he would inquire into the matter and then contact Leibowitz with an update. Executed copies of the Side Letter Agreement were not returned to TVT. Instead, in a letter from Robinson to Leibowitz dated August 14, 2002, IDJ informed TVT that IDJ was rejecting the agreement embodied in the Side Letter Agreement. The evidence at trial also indicates that the execution copies of the Side Letter Agreement had actually been signed by Jeffrey Kempler ("Kempler"), IDJ's senior vice president of business and legal affairs, sometime in late 2001 and had been stored at IDJ's offices. The evidence further indicates that sometime in early to mid-August 2002, at or around the time IDJ's rejection letter was sent to TVT, Kempler crossed out his signature on this document.

In or around June 2002, TVT granted IDJ's request for a license to use a musical composition and a TVT sound recording entitled "Get Tha Fortune" in a digital video disc entitled "Irv Gotti Presents: The Inc." (the "DVD") which IDJ marketed and distributed. TVT indicates that it relied on representations that IDJ had consented to the CMC Album project, believing the publicity from the DVD would benefit the market performance of the CMC Album contemplated for release later that year. TVT granted IDJ permission to utilize this material prior to IDJ's written rejection or renunciation of the Side Letter Agreement. On this same theory, Gottlieb also granted Gotti permission to use one of the CMC Album songs delivered in rough form to TVT, called "The Rain," on the "Irv Gotti Presents: The Inc." compact disc (the "CD").

On March 7, 2003, the Friday before the Monday that trial of this matter was scheduled to commence, IDJ delivered to TVT a letter and accompanying documents indicating that by this means IDJ had formally agreed to the Side Letter Agreement and consented to the CMC Album project. This delivery was preceded by two related events: an oral waiver of IDJ's exclusivity rights to the Artists' services expressed by Cohen during his deposition on March 5, 2003, two days earlier; and a February 26, 2003 delivery of a putative CMC Album materials represented to be in final form.[5] A similar delivery of a purportedly finished CMC Album was made to Gottlieb's apartment on April 25, 2003, the Friday before the Monday on which the damages phase of the trial of this action commenced. Evidence at trial indicates that none of these materials could be properly

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[5] For the reasons explained in the Court's Decision and Order dated March 21, 2003, *TVT Records v. The Island Def Jam Music Group*, 254 F.Supp.2d 322 (S.D.N.Y.2003), these eve-of-trial developments led the Court to bifurcate the proceedings into separate liability and damages phases. *See also TVT Records v. The Island Def Jam Music Group*, 257 F.Supp.2d 737, 739-42 (S.D.N.Y.2003).

characterized as constituting a CMC Album in final form accepted by TVT.

III. DISCUSSION

A. *STANDARDS OF REVIEW*

The moving party bears a heavy burden to prevail on a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). Such an application is appropriately granted where "there is no legally sufficient evidentiary basis for a reasonable jury to find for a party." *Merrill Lynch Interfunding, Inc. v. Argenti*, 155 F.3d 113, 120 (2d Cir.1998). The Court may not arrive at this determination by evaluating the credibility of witnesses or the relative weight of the evidence. Rather, in assessing a motion for judgment under Rule 50, the Court must view the evidence in the light most favorable to the non-movant. *See Caruolo v. John Crane, Inc.*, 226 F.3d 46, 51 (2d Cir.2000). To grant a Rule 50(b) application, there must be "such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of mere surmise and conjecture, or ... such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against [it]." *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 117 (2d Cir.1994) (quoting *Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1046 (2d Cir.1992) (citations omitted)). Moreover, arguments not raised in a preceding Rule 50(a) application are not properly preserved for review in a subsequent Rule 50(b) motion. *See Holmes v. United States*, 85 F.3d 956, 963 (2d Cir.1996) ("The issue was not mentioned in the ... Rule 50(a) motion. ... We therefore have no occasion to rule on this ... claim."); *Cruz v. Local Union No. 3*, 34 F.3d 1148, 1155 (2d Cir.1994) ("If an issue is not raised in a previous motion for a directed verdict, a Rule 50(b) motion should not be granted unless it is required to prevent manifest injustice." (citations omitted; internal quotations omitted)).

The standard for granting a Rule 59 motion is less stringent. First, the trial judge may weigh the evidence himself and need not view it in the light most favorable to the non-movant and, second, the motion may be granted even if substantial evidence may support the jury's verdict. *See DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134 (2d Cir.1998); *Sharkey v. Lasmo (Aul Ltd.)*, 55 F.Supp.2d 279, 283 (S.D.N.Y.1999), *aff'd*, 214 F.3d 371 (2d Cir.2000). The Court may grant a new trial "if it is convinced that the jury had reached a seriously erroneous result or that the verdict is a miscarriage of justice." *Song*, 957 F.2d at 1047 (citations omitted; internal quotations omitted); *accord Katara v. D.E. Jones Commodities*, 835 F.2d 966, 970 (2d Cir.1987). While the Court may grant a new trial even where substantial evidence supports the jury's verdict, the Second Circuit has cautioned that "the jury is empowered and capable of evaluating a witness's credibility, and this evaluation should rarely be disturbed." *Dunlap-McCuller v. Riese Org.*, 980 F.2d 153, 158 (2d Cir.1992).

Moreover, absent plain error, the Court will not review issues set forth as bases for a new trial pursuant to Rule 59 for which no timely objection was raised at trial. *See, e.g.*, Fed.R.Evid. 103; *Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629, 636 (2d Cir.1986) ("Unless this was plain error, plaintiffs' failure to object to the [issues now raised] on this ground precludes our review. ... Moreover, the purpose of the contemporaneous objection rule ... is to alert the trial judge to his error so that he can correct it ...."); *Palmieri v. Celebrity Cruise Lines, Inc.*, No. 98 Civ.2037 LAP HBP, 2000 WL 310341, at * 4 (S.D.N.Y. Mar. 27, 2000) ("A principle that strikes very deep is that a new trial will not be granted on grounds not called to the court's attention during the trial unless the error was so fundamental that gross injustice would result." (citations omitted; internal quotations omitted)); *see also Memorial Drive Consultants, Inc. v. ONY, Inc.*, No. 96 Civ. 0702E(F), 2001 WL 241781, at *6 (W.D.N.Y. Mar. 7, 2001) ("Pursuant to Rule 103 of the

Federal Rules of Evidence, the party seeking a new trial must have made a timely objection or offer of proof to preserve the evidentiary issue for review."); *Hardy v. Saliva Diagnostic Sys., Inc.*, 52 F.Supp.2d 333, 340 (D.Conn. Mar.17, 1999) ("The burden of showing the harmful error rests with the moving party ..., and unless there is 'plain error,' failure to object to an issue during trial precludes review of that issue on a motion for a new trial." (citations omitted)).

B. ***DEFENDANTS' RULE 50(b) MOTIONS***

Defendants set forth numerous claims in support of their motions for judgment as a matter of law pursuant to Rule 50(b). The Court will address each in turn.

1. ***Tortious Interference With Contractual Relations: Parties to the Heads of Agreement and Economic Justification***

Defendants argue that TVT's claim of tortious interference with contractual relations must be dismissed, and that the jury's verdict accordingly must be set aside, because the Defendants are parties to the contract that was interfered with, namely, the Heads of Agreement. Defendants posit two arguments in support of their claim that they were parties to the Heads of Agreement: that IDJ was a party because Murder, Inc., a party to the Heads of Agreement, was founded as a joint venture between Gotti and IDJ; and that IDJ was a party to the Side Letter Agreement which was incorporated into the Heads of Agreement. Defendants also assert a defense of economic justification. The latter two arguments were raised by Defendants in their motion for summary judgment. The Court fully considered and ultimately rejected those arguments in a Decision and Oder dated February 13, 2003, *see TVT Records v. The Island Def Jam Music Group*, 244 F.Supp.2d 263, 273-75 (S.D.N.Y.2003); *see also TVT Records v. The Island Def Jam Music Group*, No. 02 Civ. 6644 (VM), 2003 WL 1858151, at *4 (S.D.N.Y. Apr. 9, 2003) (same arguments presented and rejected in context of Defendants'

motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a) following liability phase), and for the reasons stated therein, these arguments remain unpersuasive as recast in the present context.

The Court is also unpersuaded by Defendant's remaining argument, namely, that by virtue of IDJ's joint venture relationship with Murder Inc., which was a party to the Heads of Agreement, they, too, were parties to that agreement.[6] Prior to the commencement of the trial of this matter, the Defendants submitted to the Court various motions *in limine*. One of those motions concerned the admissibility of certain statements by Gotti, the principal of Murder Inc. TVT claimed that Gotti's statements were those of a party opponent in that the relationship between Murder Inc. and IDJ effectively rendered Gotti an agent of that defendant. In response, IDJ and Cohen argued as follows:

> Gotti's alleged statements are not admissible against IDJ for the simple reason that they cannot be attributed to IDJ. IDJ and Gotti are joint venture partners, but the statements at issue do not concern that business. Rather, they concern *a business project separate from the IDJ/Gotti joint venture*. Under the Limited Liability Company

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[6] IDJ and Gotti each enjoyed a fifty percent stake in the joint venture. (See The Limited Liability Company Agreement of M.I. Records, LLC dated December 17, 2001, § 30.1 (attached as Ex. E to Declaration of David A. Picon dated February 28, 2003 (the "Murder Inc. Joint Venture Agreement").) Cohen, the chairman of IDJ, was designated to serve on the Murder Inc. management board "as IDJ's representative." *Id.*, § 7.01(a).) The Murder, Inc. Joint Venture Agreement further provides that "IDJ may replace IDJ's designated representative ... or revoke its appointment of any previously designated IDJ representative at any time and from time to time by giving written notice ...." Accordingly, Cohen's relationship to Murder Inc. is entirely derivative of that of IDJ. Furthermore, testimony at trial indicates that Cohen was not even aware of his board member status, suggesting a formalistic quality to this role, which, in turn, further subordinates any such relationship. (Liability Tr. at 1020.)

> Agreement, dated December 17, 2001, which establishes the joint venture between IDJ and Gotti (the "Joint Venture Agreement"), Gotti is to serve as talent finder and producer to IDJ on an exclusive basis. To the extent that Gotti had any discussions with Mr. Leach or Mr. Gottlieb regarding an agreement to provide these very services to TVT, his actions were in conflict with the express terms of the Joint Venture Agreement, and thus could not, by definition, have been made within the scope of the joint venture. As such, Gotti's alleged statements cannot be attributed to IDJ as an admission of a party-opponent.

(Memorandum Of Law In Support Of Defendants-Counterclaimant's Motion *In Limine* To Preclude TVT From Introducing Hearsay Statements Of Irv Gotti dated February 28, 2003 at 4 (emphasis added).) By Defendants' own characterization, then, Gotti's and Murder Inc.'s participation in the CMC Album project with TVT lay outside the scope of the joint venture agreement between Gotti and IDJ. In fact, repeatedly and emphatically throughout the liability phase of the trial, Defendants insisted that Gotti's statements and actions concerning the CMC Album project were made solely on behalf of Murder Inc. and could not be attributed to IDJ under agency principles. Based on these representations of Gotti's relationship to IDJ and the materials then on the record, the Court so ruled. (*See* Liability Tr. at 1014-18 (argument by the parties and Court's ruling that "I cannot say as a matter of law that Mr. Gotti was an agent ....")

Consequently, to the extent Defendants accurately characterized Gotti's and Murder, Inc.'s involvement in the Heads of Agreement as a "business project separate from the IDJ/Gotti joint venture," they cannot now invoke that very joint venture agreement as a basis to assert themselves as parties to the Heads of Agreement. Also, in their Rule 50(a) motions, neither Defendant raised the

argument that IDJ was a party to the Heads of Agreement by virtue of Murder Inc.'s involvement. Therefore, the argument must be dismissed on this basis as well. *See Holmes*, 85 F.3d at 963; *Cruz*, 34 F.3d at 1155.[7]

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[7] Defendants argue that any failure on their part to raise arguments in their Rule 50(a) motions should be excused because the Court "truncated" their oral application during the trial. (IDJ's Reply Memorandum Of Law In Support Of Its Motion For Judgment As A Matter Of Law Pursuant To Fed.R.Civ.P. 50(b) dated August 1, 2003 at 3.) The Court disagrees with this characterization, noting that, at most, it merely indicated a preference for expediency. Beginning with the damages phase, the Court first notes that it asked at the outset how much time IDJ's counsel would require for his presentation, which was made primarily on behalf of IDJ but also for Cohen, (*see, e.g.*, Damages Tr. at 1116 ("There's no punitive damages that should be awarded against Mr. Cohen because ....").) (Damages Tr. at 1111.) More than the designated time was provided, and what the Court, after the designated time period had lapsed, indicated was that counsel should "wrap up." (Damages Tr. at 1118.) The Court did permit subsequent comment afterwards. (Damages Tr. at 1121-22.) Second, the Court received a written Rule 50(a) application from Cohen's counsel, in which IDJ joined. (Damages Tr. at 1118-19.) Third, there is no reason for IDJ to believe that it could not submit its own written motion like the one submitted by Cohen, in which IDJ joined, if IDJ felt that additional argument were necessary.

Similarly, during the liability phase, the Court never "truncated" Defendants' counsel's presentation in support of their motion under Rule 50(a). Rather, the Court ended counsel's *reply* presentation following TVT's response to Defendants' initial presentation, and the Court did so because counsel's reply arguments had become largely repetitive of its initial presentation. (Liability Tr. at 1625-26.) Indeed, with respect to the initial presentation by Defendants' counsel, the following exchange occurred at the outset addressing counsel's time demands:

> Defendants' Counsel: ... We move to dismiss under Rule 50 on the following grounds. First let us take the breach of contract claim which I believe is Count 2.
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> TVT's Counsel: If this is going to be lengthy, would it make sense to go into chambers, your Honor?
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> The Court: Are you gong to go into details of what your claims are?
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> Defendants' Counsel: Not too much. Let me try it this way, and if your Honor feels we should move, we'll move.

(Liability Tr. at 1609.) Defendants' counsel then proceeded with his argument. Nothing in this exchange indicates any basis to infer that the

2. *Tortious Interference With Contractual Relations: Scope of Cohen's Employment*

Cohen raises an additional argument in support of his motion for judgment as a matter of law as regards TVT's claim of tortious interference with contractual relations against him. Cohen relies on *Petkanas v. Kooyman*, 303 A.D.2d 303, 759 N.Y.S.2d 1 (2003), to argue that the jury's verdict must be set aside because TVT failed to prove that Cohen acted beyond the scope of his employment and with the intent to harm TVT's business for his own personal gain. Initially, the Court notes that Cohen raised this argument for the first time in his Rule 50(a) motion presented during the damages phase of this litigation. As the matter at hand relates to the sufficiency of the evidence concerning liability and not damages, the matter was improperly raised during the damages phase and instead should have been raised as part of his Rule 50(a) motion presented during the liability phase. As grounds for judgment as a matter of law under Rule 50(b) must have been properly asserted pursuant to a motion under Rule 50(a), this argument must be dismissed on this basis. *See Holmes*, 85 F.3d at 963; *Cruz*, 34 F.3d at 1155. Nonetheless, the Court will address the argument here and identify an independent basis to reject the claim, noting that it fails not on the evidence but on the law.

The requirements of activity beyond the scope of employment, malice, and personal gain invoked by Cohen are referenced out of context. That heightened standard

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Court "truncated" the opportunity for argument. While the Court, shortly thereafter, declared a ten minute break for the jury, (Liability Tr. at 1610), there is no indication that the anticipated time frame in any way was a limitation on the argument, as opposed to an estimation, particularly in light of the fact that virtually all mid-morning or mid-afternoon breaks through that point (and also thereafter) were announced as ten minutes in length and that these breaks had tended to last considerably longer. Indeed, Defendants' counsel was allowed to argue and conclude his presentation without any further comment from the Court. (Liability Tr. at 1611-19.) For all of these reasons, the Court rejects Defendants' argument that any failures to raise arguments for judgment as a matter of law under Rule 50(a) should be excused.

applies when a corporate officer is accused of tortiously interfering with, or inducing the breach of, a contract between that officer's employer corporation and a third party. *See, e.g., Maillet v. Frontpoint Partners, L.L.C.*, No. 02 Civ. 7865(GBD), 2003 WL 21355218, at *2 (S.D.N.Y. June 10, 2003) ("Under ... New York law, officers and directors are only liable for interfering with their *own company's contracts* if they exceed the scope of their authority." (emphasis added)); *The High View Fund, L.P. v. Hall*, 27 F.Supp.2d 420, 429-30 (S.D.N.Y.1998) (holding that a director of a corporation "may be held liable for tortious interference *with the corporation's contracts* if she exceeds the scope of her corporate authority in causing the breach of those contracts." (emphasis added)); *Petkanas*, 303 A.D.2d 303, 759 N.Y.S.2d at 2 ("[A] cause of action seeking to hold corporate officials personally responsible *for the corporation's breach* of contract is governed by an enhanced pleading standard." (citation omitted; emphasis added; internal quotations omitted)); *Hoag v. Chancellor, Inc.*, 246 A.D.2d 224, 677 N.Y.S.2d 531, 534 (1998) ("To establish a corporate officer's liability for inducing a breach of a contract *between the corporation and a third party*, the complaint must allege that the officers' ... acts were taken outside the scope of their employment or that they personally profited from their acts." (citations omitted; emphasis added; internal quotations omitted)).

The theory underlying this special treatment of corporate officials derives from the principle that one cannot be liable for interfering with one's own contract. *See, e.g., Tejidos Chardin, S.A. v. Turkie*, No. 97 Civ. 4643(JSM), 1998 WL 886986, at *1 (S.D.N.Y. Dec.18, 1998) ("Where the corporate officer/director is acting within the scope of his or her authority, the officer/director is not a third party vis-a-vis the corporation and as such can not interfere with its own contract."); *Solow v. Stone*, 994 F.Supp. 173, 181 (S.D.N.Y.1998) ("A corporation's officer or director generally cannot be held liable under a theory of tortious interference for causing the corporation to breach a

contract. ... [This principle is] consistent with the principle that a defendant cannot tortiously interfere with a contract if he is not a third party unrelated to the contract." (citations omitted; internal quotations omitted)).

Outside of that particular situation—that is, where, as here, the corporate official's employer company is not a party to the affected contract— the Second Circuit has held that "a corporate officer who controls corporate conduct and thus is an active individual participant in that conduct is liable for the torts of the corporation." *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir.1985). Likewise, this Court has previously held that "New York law provides that a corporate officer who participates in the commission of a tort, even if he acts on behalf of the corporation and in the course of his corporate duties, may ordinarily be held individually responsible." *Davidcraft Corp. v. Danu Int'l, Inc.*, No. 90 Civ. 6578(CMM), 1992 WL 162997, at *6 (S.D.N.Y. June 24, 1992); *Nat'l Survival Game v. Skirmish, USA Inc.*, 603 F.Supp. 339, 341 (S.D.N.Y.1985) (same).

The contract that is the subject of TVT's tortious interference claim is the Heads of Agreement. Indeed, while TVT asserted a breach of contract claim against IDJ for breaching the Side Letter Agreement, no corresponding claim was asserted against Cohen, presumably in recognition of this line of authority. Because, for reasons previously indicated, IDJ was not a party to the Heads of Agreement, the heightened showing of malice, personal gain, and activity beyond the scope of employment are inapposite, and Cohen's argument on this basis is without merit.[8]

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[8] Cohen also cites language in *Petkanas* to argue that a similar heightened showing is required to support the jury's punitive damages award against him. Not only does *Petkanas* not apply to the facts of the case at bar for the reasons discussed in the main text, but, furthermore, the dispute in *Petkanas* did not concern punitive damages. Instead, the State court addressed the pleading requirements of a claim of tortious

3. *Fraud By Fraudulent Concealment: Duplicative of Breach of Contract and the Defendants' Duty To Disclose*

Defendants next argue that the jury's verdict of liability for fraud by fraudulent concealment is unsustainable as a matter of law because the Defendants' failure to disclose an intent not to perform is duplicative of TVT's breach of contract claim. This Court previously addressed these arguments, raised pursuant to the Defendants' motion for summary judgment, concluding that the contentions lacked merit. *See TVT Records*, 244 F.Supp.2d at 275-77. For the reasons stated therein, the Defendants' arguments are again rejected.

Defendants also argue that they had no duty to disclose their intent not to perform because no fiduciary relationship existed between them and TVT. This argument must be dismissed as it was not raised pursuant to the Defendants' Rule 50(a) motion made during the liability phase of the trial of this matter. *See Holmes*, 85 F.3d at 963; *Cruz*, 34 F.3d at 1155. The argument, more substantively, represents a selective, and thus unpersuasive, reading of the law. It is well settled that New York law imposes a duty to disclose for purposes of fraudulent concealment liability not only in cases involving a fiduciary or confidential relationship, which Defendants indicate, but also when (1) a party makes a partial or ambiguous statement that requires clarification, and when (2) one party has superior knowledge of certain information that is not readily available to the other party and the first party knows that the second party is acting on the basis of mistaken knowledge. *See Banque Arabe Et Internationale D'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146, 155 (2d Cir.1995); *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150, 151-52 (2d Cir.1993).

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interference with contract asserted against members of a company's board of directors. Therefore, Cohen's reliance in this case to challenge the jury's award of punitive damages against him is similarly misplaced.

The relevant superior knowledge possessed by Defendants is reflected in the jury's verdict of liability for breach of contract, fraud by fraudulent concealment, and copyright infringement (insofar as the license defense was rejected). It includes their intent not to perform in accordance with their representations to TVT—that is, their undisclosed intent not to permit the Artists to participate in the CMC Album project—coupled with their desire to placate the Artists, who had expressed interest in the CMC Album project, pending their contract re-negotiations with IDJ. Furthermore, with respect to partial disclosures and ambiguous statements, Cohen himself testified that he was "unclear" to TVT about IDJ's position as regards its assent to the CMC Album,[9] and, similarly, Kempler admitted that in the face of the parties' representations and profit sharing and logistical negotiations concerning the CMC Album project, no one at IDJ responded to Leibowitz's November 15, 2001 letter to IDJ on behalf of TVT indicating that TVT was relying on verbal assurances of IDJ's consent to the CMC Album project, (Liability Tr. at 301-305). Defendants' argument for judgment as a matter of law with respect to the jury's finding of liability against them for fraud by fraudulent concealment, based on their claim that they were not bound by any duty to disclose, must therefore be rejected on this basis as well.

4. ***Copyright Infringement; Validity of the Licenses and Knowledge of Ownership***

Defendants argue that the evidence is insufficient to support the jury's finding of liability for copyright

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[9] *See, e.g.*, Liability Tr. at 1089-92 (Q: "And did you tell Mr. Gottlieb at that time words to the effect of, IDJ would not waive its exclusivity rights and you would not permit Irv Gotti or Ja Rule to work on the CMC album, correct? ... A: No."); (Damages Tr. at 303-306, 309-310 ("I would have been absolutely emphatic in my position and not been wishy-washy. ... I'm upset at myself for not giving a clear and absolutely emphatic answer of my instructions from day one, whether I should have just gone along with Irv and allowed this to happen or said no.")).

infringement because the protected works in question were used pursuant to what the Defendants, even now, claim to be valid licenses. This proposition was squarely rejected by the jury's verdict of liability for copyright infringement as against both Defendants, thus sustaining TVT's argument that the licenses were procured by fraud and therefore invalid. (Jury Verdict Sheet at 4-6.)[10] Cohen further argues that the evidence was insufficient to support the jury's finding of direct, contributory, or vicarious copyright infringement or that any such infringement was willful. The Court has already addressed these matters at least twice elsewhere. *See TVT Records*, 244 F.Supp.2d at 269-72 (summary judgment motion); *TVT Records*, 2003 WL 1858151, at *5-*6 (Rule 50(a) motion following liability phase). For the reasons there indicated, the Court finds that the evidence is sufficient to sustain the jury's findings of liability for willful copyright infringement by IDJ and for willful direct, contributory, and vicarious copyright infringement by Cohen.

Defendants do raise a new challenge to their liability for willful copyright infringement. Both claim that they did not have knowledge of TVT's ownership in "The Rain," and Cohen further claims he did not know "Get Tha Fortune" appeared on the "Irv Gotti Presents: The Inc." DVD.[11] At the outset, the Court notes that these arguments were not raised in Defendants' motions pursuant to Rule 50(a) and must be dismissed on this basis. *See Holmes*, 85 F.3d at 963; *Cruz*, 34 F.3d at 1155.

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[10] The jury also found both Defendants liable for fraud by fraudulent concealment. (Jury Verdict Sheet at 3.) The Defendants' challenge to the sufficiency of the evidence underlying this aspect of the jury's verdict is addressed in the preceeding section and rejected for the reasons there discussed.

[11] IDJ sought and obtained a written clearance from TVT to use "Get Tha Fortune" on this release, presumably foreclosing a corresponding claim of lack of knowledge by IDJ.

Even on the merits, though, the arguments are unpersuasive. The law does not require knowledge to establish copying for purposes of copyright infringement. Rather, the law recognizes that "[i]t is generally not possible to establish copying as a factual matter by direct evidence, as it is rare that the plaintiff has available a witness to the physical act of copying. ... Therefore, copying is ordinarily established indirectly by the plaintiff's proof of access and substantial similarity." *Langman Fabrics v. Graff Californiawear, Inc.*, 160 F.3d 106, 115 (2d Cir.1998) (internal quotations omitted) (quoting 4 Melville Nimmer and David Nimmer, *Nimmer on Copyright* § 13.01[B] (1998)); *see, e.g., Boisson v. Banian, Ltd.*, 273 F.3d 262, 267-68 (2d Cir.2001); *Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir.1996). With respect to "The Rain," similarity is not an issue in dispute, as the very song intended for the CMC Album was itself used, instead, on the "Irv Gotti Presents: The Inc." CD.

Regarding access, this element "may be established directly or inferred from the fact that ... a party had a reasonable possibility of viewing the prior work." *Boisson*, 273 F.3d at 270 (citing Nimmer, *supra* § 13.02[A]). The record contains sufficient evidence to support an inference of access. The evidence indicates that IDJ and Gotti were equal partners in the Murder Inc. venture and that Murder Inc. and IDJ had offices on successive floors in the same building and worked together on numerous album releases including the "Irv Gotti Presents: The Inc." CD and DVD. Because Gotti and Cohen, and Murder Inc. and IDJ collaborated regularly in the promotion, content screening, copyright clearance, and marketing strategy for these and other Murder Inc. releases, as the evidence indicates, Defendants clearly had sufficient access to "The Rain" to defeat Defendants' present challenge to the jury's verdict of

liability against them.[12] (*See, e.g.*, Liability Tr. at 503-504, 1059, 1107-1110.)

Similarly, whether Cohen did or did not know about the inclusion of "Get Tha Fortune" on the "Irv Gotti Presents: The Inc." DVD, which was marketed and distributed by IDJ, is a credibility matter that the jury apparently resolved against Cohen based on evidence such as that discussed above detailing the extent of Cohen's interactions with Gotti and Murder Inc. The Court finds no basis to disturb such a finding. Finally, to the extent that Defendants raise this issue of knowledge as regards not liability but willfulness, the Court, as mentioned, has already addressed the basis for this jury finding and has found the evidence sufficient to sustain it. *See TVT Records*, 244 F.Supp.2d at 269-72; *TVT Records*, 2003 WL 1858151, at *5-6.

5. ***Standing of TVT Music, Inc.***

Defendants also argue that TVT Music, Inc. has no standing to assert claims for breach of contract, tortious interference with contractual relations, or fraud against Defendants in this litigation because it was not a party to nor a third party beneficiary of the Heads of Agreement. Defendants also seek a new trial on this basis as to the assertion of these claims by TVT Records, should the Court agree that TVT Music, Inc. lacks standing, because there would be no way to allocate the jury's award between the two plaintiffs and reduce it to reflect any such lack of standing by TVT Music, Inc.

Under New York law, a third party to a contract is considered an intended third party beneficiary where that party's "right to performance is appropriate to effectuate the intention of the parties to the contract *and* either the performance will satisfy a money debt obligation of the

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[12] For these reasons, Defendants' argument in support of their motion for a new trial that the weight of the evidence counsels against a finding that IDJ knew about TVT's copyright interest in "The Rain" is rejected as inapposite.

promisee to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Vista Co. v. Columbia Pictures Industries, Inc.*, 725 F.Supp. 1286, 1296 (S.D.N.Y.1989) (citation omitted; emphasis in original; internal quotations omitted); *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 573 (2d Cir.1991); *see Septembertide Publ'g, B.V. v. Stein and Day, Inc.*, 884 F.2d 675, 679 (2d Cir.1989); Restatement (Second) of Contracts § 302 (1981). In addition to the agreement itself, the Court looks to the surrounding circumstances in making this determination, as third party beneficiaries need not be named in the agreement at issue. *See Trans-Orient Marine Corp.*, 925 F.2d at 573; *Septembertide Publ'g.*, 884 F.2d at 679; *Vista Co.*, 725 F.Supp. at 1296.

TVT Music, Inc. is a wholly owned subsidiary of Tee Vee Toons, Inc., which does business as TVT Records. TVT Records and TVT Music, Inc. are the named plaintiffs in this action. TVT Music, Inc. is the publishing arm of Tee Vee Toons, Inc. and its business enterprise. (Liability Tr. at 1457.) While TVT Music, Inc. was not a designated signatory to the Heads of Agreement, Tee Vee Toons, Inc., its parent company, was a designated signatory party. The breakdown of revenues that would flow from the Heads of Agreement, had the CMC Album actually been produced and marketed, in reflection of TVT's business enterprise allotting publishing responsibility to TVT Music, Inc. is governed by the corporate structure and business relationship between those entities, and its precise terms are immaterial. What matters is that TVT Music, Inc. would have received from Tee Vee Toons, Inc.—a promisee of and party to the heads of Agreement—a benefit in the form of music publishing revenues for such services furnished to Tee Vee Toons, Inc. in connection with the CMC Album. Furthermore, Defendants, given their knowledge of the industry and, more specifically, of IDJ's own place within a larger corporate structure with generally similar allocations of publishing responsibilities to specific

affiliates,[13] knew or should have known that some such benefit would run to TVT Music, Inc. Therefore, TVT Music, Inc.'s right to performance—namely, to receive the music publishing benefits directed to it by Tee Vee Toons, Inc., a designated signatory party—is appropriate to effectuate this allocation of responsibility within TVT's business enterprise and corporate structures, and is reasonable in light of IDJ's constructive, if not actual, knowledge of the same. Accordingly, the Defendants' challenge to the standing of TVT Music, Inc. to assert breach of contract, tortious interference with contractual relations, and fraud against them is rejected, as is their request for a new trial on this basis.

6. ***Punitive Damages: Existence of Malice and a Public Aim***

Defendants challenge the sufficiency of the evidence to support the jury's award of punitive damages, in connection with its finding of liability for breach of contract and fraud, on the grounds that the evidence was insufficient to establish malice or gross, wanton, or willful conduct and the existence of a public aim. They also challenge the sufficiency of the jury's punitive damages award in connection with its finding of liability against Defendants for tortious interference with contractual relations on the ground that the evidence was insufficient to demonstrate the requisite malice or gross, wanton, or willful conduct. These arguments have been exhaustively addressed and rejected by this Court pursuant to the Defendants' motions for judgment as a matter of law under Rule 50(a) made during the damages phase of the trial of this matter. *See TVT Records v. The Island Def Jam Music Group*, 262 F.Supp.2d 188, 191-98 (S.D.N.Y.2003). The Court reiterates

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[13] The record indicates that IDJ is a corporate subsidiary of UMG Recordings, Inc. which, like Tee Vee Toons, Inc., has separate affiliates responsible for music publishing. (*See, e.g.*, Liability Tr. at 1065 (testimony by Cohen that "Universal Music Group owns it. ... owns Universal Music Publishing.").)

its findings there expressed and sees no reason to revisit its prior determinations.[14]

7. Double Recovery

Cohen raises a general challenge to the jury's awards of compensatory damages pursuant to TVT's claims under New York law as reflecting an impermissible double recovery for harm TVT sustained. The Court rejects this global challenge to the jury's awards because the Court's jury charge clearly and carefully instructed the jurors on the importance of avoiding such a double recovery and on how to reduce any awards they imposed to ensure that TVT recovers only once for any harm or component of harm it sustained. (Damages Tr. at 1285-86.) The Court neither sees nor has been presented with any basis to presume the jury ignored these instructions.

In this vein, the Court notes a curious argument posed by Cohen challenging the compensatory damages award. Cohen claims that loss of goodwill as a component of compensatory damages for tortious interference with contractual relations is inherently temporary because any loss of goodwill resulting from TVT's inability to release the CMC Album would be alleviated once the album were to be released. Therefore, according to Cohen, awarding TVT lost profits together with the value of this harm to its goodwill is duplicative. (Defendant Lyor Cohen's Memorandum Of

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[14] Defendants also dispute the jury's award of punitive damages pursuant to its findings of liability for copyright infringement of "Get Tha Fortune," asserting that punitive damages are unavailable in copyright infringement cases. The Court articulated its concerns regarding the uncertainty of the law in this matter and its conclusions about the availability of punitive damages for copyright infringement claims during one of the numerous conference addressing the contents of the Court's jury charge. *See TVT Records v. The Island Def Jam Music Group*, No. 02 Civ. 6644 (VM), 262 F.Supp.2d 185, 2003 WL 21047726 (S.D.N.Y. May 7, 2003). Nonetheless, because TVT has elected to receive statutory damages in lieu of compensatory and punitive damages on this claim, the jury's punitive damages awards do not constitute any portion of the Judgment entered by the Court in this case. Therefore, the Court need not address this challenge in this context.

Law In Support Of His Motions For Judgment As A Matter Of Law, New Trial And/Or Remittitur (undated) ("Cohen Br.") at 24.) Irrespective of the accuracy of such speculation, it is not lost on the Court that the CMC Album, the one at the core of this very litigation, has not been released, nor is there any indication that it can or will be released. Therefore, Cohen's argument on this basis is meritless.[15]

8. *Loss of Goodwill*

IDJ challenges the sufficiency of the evidence underlying the jury's award of damages for harm to TVT's goodwill pursuant to its verdict of liability against IDJ for breach of contract and against both Defendants for tortious interference with contractual relations on various grounds, some old and others new. The Court will address these matters in turn.

In response to the portion of Defendants' motion pursuant to Rule 50(a) set forth during the damages phase of the trial of this matter challenging the sufficiency of the evidence of loss of goodwill, this Court identified the potential audience for TVT's goodwill to include album purchasers as well as artists and other business entities doing business with TVT. The Court also there identified the following grounds upon which the jury, on the basis of this record, could infer loss of goodwill: advertisements promoting the anticipated CMC Album and "setting up" the marketplace for its release, which never occurred; the loss of TVT's credit line resulting from the disruption in cash flow as a consequence, at least in part, of TVT's inability to exploit the CMC Album as anticipated; loss of or damage to TVT's business relationship with Gotti, a highly successful producer able to furnish services of artists like Ja Rule; and, more generally, the harm to TVT's reputation in the industry resulting from its inability to follow through with

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[15] For the reasons indicated in Sections II.B.(8) and II.B.(9) *infra*, the evidence is sufficient to support the independent awards of lost profits and harm to goodwill.

representations of a forthcoming CMC Album release that may affect not only the confidence of its existing artists—should, for example, contract renegotiations become necessary, as was the case between IDJ and Gotti and Ja Rule—but also that of prospective artists. *See TVT Records*, 262 F.Supp.2d at 190-91.

As regards Gotti and Ja Rule, IDJ raises the argument that these individuals' exclusive services contracts with IDJ render their attitudes concerning TVT's goodwill inapposite since any business dealings between them and TVT would require IDJ's consent. First, this argument was not raised in either of the Defendants' Rule 50(a) motions and must be dismissed on that basis. *See Holmes*, 85 F.3d at 963; *Cruz*, 34 F.3d at 1155. More substantively, furthermore, the argument overlooks the possibility that these Artists might, as the record suggests was the case here, want to deal with TVT and convince IDJ to allow them to do so. It also overlooks the fact that employment contracts may at some point terminate. These Artists' contracts with IDJ do not compel the result Defendants propose. Therefore, IDJ's argument must be rejected for these reasons as well.

In challenging the sufficiency of the evidence in support of the jury's award of damages to TVT for harm to its goodwill, IDJ also argues that TVT cannot have suffered such harm because its projected sales revenues for the year 2003 had increased as compared to those for the year 2002. The Court must review the record in a light most favorable to sustaining the jury's verdict, and, while an increase in revenue may weigh against concluding that TVT's goodwill was harmed, it does not compel this result. The Court has sustained the sufficiency of the evidence underlying the jury's award of damages for loss of goodwill for the reasons summarized above. *See TVT Records*, 262 F.Supp.2d at 190-91. That evidence can reasonably outweigh the evidence of TVT's revenues that IDJ references because, as a practical matter, examining a company's revenues without similarly examining its expenses and other commitments is an incomplete understanding of that company's financial status.

Moreover, financial stability, while relevant to one of the identified bases for concluding that TVT's goodwill was harmed, namely, the loss of TVT's credit line, is not necessarily relevant to the other kinds of harm that can reasonably be said to have impacted TVT's goodwill, specifically here, its business reputation and ability to keep its current artists and attract new ones. It is not the Court's role to weigh the evidence itself but, rather, merely to determine whether a sufficient basis exists in the record to reasonably support whatever factual outcome was reached by the jury. *See Nadel v. Isaksson*, 321 F.3d 266, 272 (2d Cir.2003).

IDJ also identifies various potential kinds of harm in the nature of loss of goodwill—e.g., dissatisfaction by retailers or album purchasers—that TVT did not introduce at trial. The failure to establish loss of goodwill on one basis does not foreclose the sufficiency of TVT's showing on other grounds. In this regard, to the extent IDJ also may appear to argue that the applicable audience regarding loss of goodwill by TVT is confined to album purchasers based on the Court's use of the word, "customer," in its jury charge on the matter, the Court is not persuaded. An overall reading of the Court's instructions indicates that such harm may depend on the impressions of any individual or entity with "the basic human tendency to do business with a merchant or provider who offers products or services of the type and quality that the customer desires and expects. Service of a customer and a willingness to stand behind a warranty and other representations about the quality of the products or services that are sold by a merchant are all factors in the goodwill of that business." (Damages Tr. at 1268.) Nothing in the Court's language can reasonably be understood to restrict the relevant audience concerning TVT's goodwill to album purchasers, as opposed to producers, artists, or financial lenders for, as the Court indicated in its ruling on IDJ's Rule 50(a) motion, TVT's "customers" can include any such individual or entity doing business with TVT. *See TVT Records*, 262 F.Supp.2d at 190.

Furthermore, the remaining challenges to the portion of the jury's award reflecting TVT's loss of goodwill—specifically, whether the evidence was sufficient to permit the jury to arrive at a reasonable amount or quantification of the harm suffered by TVT, whether proper causation was demonstrated, and whether the harm to TVT's goodwill is supported by the evidence was reasonably within the contemplation of the parties at the time their agreement was reached—have been addressed by the Court in response to the parties' motion pursuant to Rule 50(a) set forth during the damages phase of the trial of this matter. *See TVT Records*, 262 F.Supp.2d at 190-91. The Court there sustained the portion of the jury's award reflecting a loss of goodwill, and the Court finds no basis to alter its conclusions in this regard.[16]

To the extent that the Court's reasoning with respect to the sufficiency of the evidence concerning the *amount* of harm to TVT's goodwill and the reasonable basis for its quantification may not have been clearly indicated in its prior ruling, the Court will here provide some elaboration. Gottlieb provided at trial an extensive explanation regarding harm akin to loss of goodwill resulting from TVT's inability to release the CMC Album as anticipated. He explained the disruption to TVT's business operations

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[16] An additional piece of evidence not identified by the Court in its prior ruling that further undercuts IDJ's position that TVT demonstrated no loss of goodwill, and its position that IDJ could not have foreseen the harm to TVT's credit and, more generally, its goodwill, is the Securities and Exchange Commission Form 6-K dated March 28, 2003 filed by Vivendi Universal (the "Vivendi 6-K"), which was admitted into evidence at trial. This document reads in relevant part: "In line with the rest of the industry, UMG's revenues and profits are driven by hits, with a relatively small proportion of releases accounting for the majority of sales." (Vivendi 6-K at 161.) This concept was also echoed by the testimony of TVT's expert witness, David Berman. (Liability Tr. at 1588.) The filing also states: "The profitability of a company's recorded music business depends on its ability to attract, develop and promote recording artists, the public acceptance of those artists and the recordings released in a particular period." (Vivendi 6-K at 165.)

and the impact on his longstanding relationship with Gotti and Ja Rule. He also explained the damage, as a result of the disruption in anticipated cash flow and expense planning, to TVT's relationship with its principal lending institution, a relationship spanning over twelve years, resulting in the loss of his credit line and TVT's inability to obtain alternative lenders. (Damages Tr. at 404-407, 434-48.) Gottlieb included various valuations for the harms suffered, and while some of those valuations addressed matters concerning, for example, lost profits, others did address goodwill. For instance, Gottlieb testified that he believed he would require $30 million to restore his credit line. (*Id.* at 437.) Overall, the evidentiary record, and in particular Gottlieb's testimony just discussed, is sufficient to permit the jury to arrive at a quantification of the harm to TVT's goodwill with reasonable certainty. The jury was free to credit Gottlieb's testimony on this matter, as it had previously done when rendering its liability verdicts against Defendants, and it is not the Court's province to re-evaluate the jury's credibility analysis in a Rule 50(b) motion. *See Nadel*, 321 F.3d at 272.

9. *Loss of Profits*

IDJ also challenges the sufficiency of the evidence in support of the jury's award of lost profits. IDJ disputes the jury's award on the basis that TVT's experts did not consider competition in the marketplace that would be present in a November 2002 release; that TVT has never marketed a hip hop album that sold two million units; that Gotti's and Ja Rule's prior successes were marketed by IDJ's affiliates and not by TVT; and that TVT's experts did not have specialized expertise in hip hop music. Each of these arguments addresses evidentiary weight, not sufficiency, and is therefore beyond the purview of the Court's present analysis. *See Nadel*, 321 F.3d at 272. IDJ also challenges the reliability of profit projections by TVT's expert, Bruce Kolbrenner ("Kolbrenner") which were in large part based on Ja Rule's and Gotti's prior success in the

marketplace,[17] and attempts to cast the CMC Album project as a "new business enterprise" for TVT requiring greater precision in the calculation of lost profits than TVT demonstrated to the jury.

The Second Circuit has explained that under New York law,

> [l]ost profits, though typically difficult to prove with exactitude, may be recovered to the extent that the evidence affords a sufficient basis for estimating their amount with reasonable certainty .... The fact that the precise amount of damage may be difficult to ascertain is not fatal to the claim, and doubts are generally resolved against the party in breach.

Sir Speedy, Inc. v. L & P Graphics, Inc., 957 F.2d 1033, 1038 (2d Cir.1992) (citations omitted; internal quotations omitted); *see S & K Sales Co., v. Nike, Inc.*, 816 F.2d 843, 852 (2d Cir.1987) (noting that a plaintiff "need only provide the jury with a sound basis for approximating with reasonable certainty the profits lost ...."). The Circuit Court propounded that "[a]ny calculation of damages based on lost profits always entails a degree of uncertainty caused by the need to rely on assumptions and estimates. The mere fact that [a party] disagrees with the methodology utilized ... or [a particular] assumption ... does not render ... proof speculative." *Travellers Int'l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1579 (2d Cir.1994) (citations omitted; internal quotations omitted) (noting that in previous cases, "statistical evidence was derived from historical operating statistics between the parties"); *see also Record Club of Am. v. United Artists Records, Inc.*, 696 F.Supp. 940, 944 (S.D.N.Y.1988) ("Although it may be improper to rely on

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[17] The Court had previously rejected challenges to the reliability of the projections contained in Kolbrenner's expert report, and to Kolbrenner's own expertise, in response to Defendants' motions *in limine* on this issue. *See TVT Records*, 250 F.Supp.2d at 350-51.

past sales as an indicator of future sales when a more accurate measure is available, there is no support for the contention that projections of past profits is improper as a matter of law."). The Circuit Court's explanation reflects the view articulated by the New York Court of Appeals that "[d]amages resulting from the loss of future profits are often an approximation. The law does not require that they be determined with mathematical precision. It requires only that damages be capable of measurement based upon known reliable factors without undue speculation." *Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 604 N.Y.S.2d 912, 624 N.E.2d 1007, 1010-1011 (1993) (citations omitted; internal quotations omitted).

Furthermore, the Second Circuit observed as regards a new business that

> a stricter standard is imposed, but ... whether the claim involves an established business or a new business ... the test remains the same, i.e., whether future profits can be calculated with reasonable certainty .... [T]he new business rule is not a per se rule forbidding the award of lost profits damages to new businesses, but rather an evidentiary rule that creates a higher level of proof needed to achieve reasonable certainty as to the amount of damages.

Int'l Telepassport Corp. v. USFI, Inc., 89 F.3d 82, 85-86 (2d Cir.1996) (citations omitted; internal quotations omitted). On this point, the New York Court of Appeals declared:

> a stricter standard is imposed because there is not experience from which lost profits may be estimated with reasonable certainty and other methods of evaluation may be too speculative. ... Whether the claim involves an established business or a new business, however, the test remains the same, i.e., whether future profits can be calculated with reasonable certainty.

Ashland Mgmt., 604 N.Y.S.2d 912, 624 N.E.2d at 1011 (citations omitted; internal quotations omitted).

The evidence introduced at trial included projections of the CMC Album's market performance based in large part on the past performance in the marketplace of releases by Ja Rule and by Gotti. As the Court indicated in its ruling in response to Defendants' Rule 50(a) motions, such evidence included testimony by Gotti, Berman, Gottlieb, and Kolbrenner, who generally predicted sales to range between one to three million units. *See TVT Records*, 262 F.Supp.2d at 190. The matter of sufficiency of the evidence proffered for introduction at trial by TVT was previously addressed by the Court in response to Defendants' motions *in limine*, *see TVT Records*, 250 F.Supp.2d at 349-50, and, once this evidence was introduced, the Court reiterated its conclusions, in the context of Defendants' Rule 50(a) motions, that the evidence introduced by TVT was sufficient to sustain a jury verdict awarding lost profits, *see TVT Records*, 262 F.Supp.2d at 190-91. Since then, the jury awarded TVT damages reflecting lost profits totaling $10,389,003.00. This figure is consistent with, and indeed arguably conservative in light of, the optimistic expectations of the CMC Album's market performance by the witnesses identified above. It is reflective of the market performance figures offered by Kolbrenner corresponding to sales of two million units.[18]

The record reflects past market performance of album releases by Ja Rule and Gotti well beyond two million units. For example, while Ja Rule's November 2002 release entitled "The Last Temptation," sold only approximately 1.5 million units—in part, according to Gotti, because of content

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[18] Kolbrenner's report and testimony included projected sales figures and revenues for three alternative market performance prospects, namely, sales of one million, two million, or three million units. The jury was thus able to determine, based on the broader evidence discussed, how many units were likely to have been sold and, in turn, how much profit TVT lost due to its inability to release the CMC Album.

changes made as a consequence of the preliminary injunction imposed in this matter—Ja Rule's other releases produced sales of 1.3, 3.3., and 3.6 million units, individually. Gotti produced each of these albums as well as other equally successful albums by other artists. IDJ challenges the jury's reliance on the past performance of the Artists as a basis to project CMC Album sales and market performance. As a threshold matter, as the Court previously ruled, *see TVT Records*, 250 F.Supp.2d at 349, it is reasonable to rely on Gotti's and Ja Rule's past performance in the marketplace as guideposts for projecting CMC Album sales since Ja Rule is only one of three members of CMC and because Gotti has or would have produced the CMC Album. Furthermore, the record indicates that TVT, the largest independent music label in the United States, has a lengthy track record of successful album releases in various genres, and also has some experience exploiting urban or hip hop albums, though to a more limited extent.

Given this evidence, the jury's verdict awarding TVT lost profits was reasonably supported by the evidentiary record and cannot be considered unduly speculative. *See, e.g., Care Travel Co., Ltd. v. Pan Am. World Airways, Inc.*, 944 F.2d 983, 994 (2d Cir.1991) (breach of exclusive sales contract by airline entitled travel agency to lost profits calculated based on projected quotient of sales by unauthorized rival to destinations within the exclusive purview of plaintiff agency); *S & K Sales Co.*, 816 F.2d at 852 (sales during final year of contract, prior to breach, can predict future sales to determine lost profits); *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 927 (2d Cir.1977) (sustaining lost profits from royalties from future record sales, based on past record sales prior to contract breach, while finding profits from collateral benefits like tours and promotions theoretically driven by such projected sales too speculative and remote); *Record Club of Am.*, 696 F.Supp. at 944 (following breach of licensing agreement granting record subscription club use of record company's catalogue of albums, record club's "lost

profits equal the profits it earned under the contact in the pre-breach base period, annualized and projected throughout the life of the contract."); *PEI Export, Inc. v. Laidlaw Transit, Inc.*, No. 97 Civ. 0253E(H), 1999 WL 528801, at *4 (July 6, 1999) (plaintiff school bus reseller could rely on past sales prices and on industry reference material to establish lost profits from breach of contract by bus supplier despite absence of evidence either that plaintiff had entered into contracts to resell the undelivered busses or that plaintiff had even been approached by prospective purchasers); *Greasy Spoon, Inc. v. Jefferson Towers, Inc.*, 75 N.Y.2d 792, 552 N.Y.S.2d 92, 551 N.E.2d 585, 587 (1990) (lessee was prevented by lessor from constructing sidewalk café in violation of parties' agreement; challenge to lost profits award as unduly speculative was rejected by the New York Court of Appeals because lessee "was already operating a successful restaurant business ... [and] plaintiff's witnesses gave evidence, based upon experience, as to the level of profits that could reasonably be anticipated from the addition of a sidewalk café. ... [I]n this case most of the variables that would affect the success of the thwarted business venture, i.e., location, capitalization and existing or potential clientele, were established through competent proof.").

Beyond this threshold determination, whatever the distinction between CMC, a trio including Ja Rule, and Ja Rule as a solo artist, and its implications regarding the extent to which Ja Rule's solo performance (and Gotti's involvement) can predict the market performance of the group are factual and credibility matters within the province of the jury that the Court cannot reassess in connection with Rule 50(b) motions.

For these reasons, and those set forth in the Court's prior rulings referenced above, IDJ's claim that the jury's award of lost profits is unduly speculative and unsupported by the evidence is rejected, and its motion for judgment as a matter of law on this basis is denied.

C. *DEFENDANTS' MOTIONS FOR A NEW TRIAL*

Defendants advance numerous theories, pointing to various events at trial, to argue that the jury's verdict against them was the product of undue prejudice requiring a new trial. Some of the events they set forth in actuality reflect no prejudice, while others could be construed to reflect a certain amount. The 3,500 page trial record memorializes over fourteen trial days (excluding weekends and jury deliberations) during which evidence was presented and each side set forth its case to the jury. Defendants' motion papers endeavor to present a potentially convincing case by painting a picture that selectively draws together various obviously one-sided instances throughout this record. A sober review of those underlying incidents in context and of the record as a whole, however, compels the Court to find that even if some prejudice may have occurred to the detriment of both sides[19] in this litigation, it was not so significant, pervasive, or infectious as to constitute a basis to order a new trial.

1. *Trifurcation of the Trial*

Cohen argues that the jury's award of punitive damages was impermissibly tainted by the Court's refusal to divide the trial of this dispute, beyond the bifurcation of liability and damages issues, into a three phase trial to permit the jury to separately determine the availability of punitive damages and then their amount. The Court has already fully expressed its reasoning with respect to Defendants' request for trifurcation. *See TVT Records*, 257 F.Supp.2d at 746-47. The Court finds no reason to revisit this

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[19] In its position as nonmovant, TVT is defending against allegations of prejudice and is not in a position to set forth any moments of prejudice that it believes occurred to its detriment, beyond certain categorical remarks to this effect in its papers. (*See, e.g.*, TVT's Consolidated Opposition To Defendants' Post-Trial Motions On liability Issues dated July 18, 2003 ("TVT's Liability Br.") at 31 "More fundamentally, [TVT's counsel] cannot hold a candle to Defendants' counsel when it comes to speaking objections at trial." (citations to record omitted).)

determination, which, for the reasons set forth in the Court's prior ruling on the matter, and is supported in law and compelled by the facts and, accordingly, not a basis for granting Defendants' motion for a new trial.

2. *Size of the Awards*

Cohen also points to the fact that the jury awarded TVT punitive damages against Cohen in the amount of $56,000,000.00, when his testimony and Statement of Net Worth indicates a net worth of approximately $29 million, as evidence of such bias and prejudice that the jury was incapable of following the Court's instructions that in fixing the amount of punitive damages, the jury should consider in part each defendant's financial resources. The significance of this apparent disparity, and the appropriate response by the Court, is addressed in and encapsulated by the Court's discussion of the Defendants' request for remittitur set forth in a separate Decision and Order issued simultaneously with the Court's ruling herein.

3. *References to Vivendi Universal*

IDJ asserts a twofold argument of prejudice from TVT's references to Vivendi Universal, IDJ's parent corporation, namely, that evidence of that company's wealth prejudiced the jury's determination of the amount of punitive damages and that such references capitalized on "heightened feelings of patriotism, and anti-French sentiments, during the war with Iraq." (Memorandum Of Law In Support Of IDJ's Motion For A New Trial Pursuant To Fed.R.Civ.P. 59 Or, At A Minimum, For Remittitur Of The Punitive Damage Awards dated June 16, 2003 ("IDJ's New Trial Br.") at 17.) The former argument is essentially a challenge to the size of the jury's verdict, and this matter is addressed in the Court's separate ruling on the Defendants' motions for remittitur mentioned above.

Of the three citations to the trial record put forth by IDJ in support of the latter argument, two only highlight references to Vivendi Universal itself and do not indicate that Vivendi Universal is a French entity. (*Id.* (citing

Damages Tr. at 148-49 and 1235).) At best, the context in which these references occurred indicates merely that Vivendi Universal is an international corporation. (*See, e.g.*, Damages Tr. at 147 (referencing "Universal Music Group Worldwide").) The remaining citation, too, is mischaracterized insofar as it is attributed to TVT's counsel. In fact, the reference to Vivendi Universal being a French corporation appears in the trial testimony of a witness being questioned by TVT's counsel.

While addressing the matter of the financial impact of Defendants' actions on TVT, which, unlike IDJ, is an independent record company, TVT's counsel asked Gottlieb: "What has been the impact on your company's operations as a result of not being able to release the CMC album in November of 2002?" (Damages Tr. at 404.) In response, Gottlieb's answer began as follows: "The biggest—probably one of the biggest consequences is we've lost our line of credit with the bank and our credit has been ruined. An independent business doesn't rely on some big company in France to fund them. I have an 18 year track record of funding the company myself ...." (Damages Tr. at 404-405.)

Nothing in TVT's counsel's question in any way suggested or induced the witness to refer to Vivendi Universal as a "big company in France." Additionally, Gottlieb's characterization cannot in any reasonable way be construed as "attempting to capitalize on heightened feelings of patriotism, and anti-French sentiments, during the war with Iraq" as the Defendants claim. (IDJ's New Trial Br. at 17.) It is quite evident from the context, and indeed from the brief excerpt quoted above, that the point of identifying Vivendi Universal in this way was to highlight the smaller size of TVT to emphasize the financial consequences of Defendants' actions. The interpretation now proposed by IDJ's counsel in the context of arguing the present motion for a new trial did not occur to the Court when the statement was made, nor did it apparently occur to any of the lawyers employed by the three law firms representing Defendants in this matter, as none of them

voiced an objection at the time.[20] There is no basis to presume that the jury's interpretation was any different. Finally, the Court reiterates that the trial record contains over 3,500 pages of transcript memorializing almost three weeks (14 trial days) of testimony and argument (excluding jury deliberations). Even if the jury were to have made the link now proposed by the Defendants, the Court does not consider the reference to have engender such significant prejudice as to warrant a new trial. For these reasons, Defendants' application for a new trial on this basis must be denied.

4. *Private Investigator*

Cohen also asserts as a basis for a new trial prejudice from TVT's questioning during the damages phase of a former TVT employee about telephone calls she received from a private investigator hired during the course of the present litigation by Defendants' law firm, who, reportedly, asked the witness if she had any knowledge that Gottlieb had ties with the mafia, drugs, or improper business practices. The former employee was apparently bothered by the communication and informed Gottlieb about it. TVT introduced a copy of the former employee's email communication to Gottlieb as well as testimony from her about the incident.

Before this evidence was taken, Defendants raised an objection outside of the jury's presence. Substantively, Defendants argued that this communication was not relevant because it was counsel and not Defendants who hired the investigator and because the communication occurred after litigation commenced. (Damages Tr. at 292-95.) TVT responded that, in its view, the communication "was designed to damage Mr. Gottlieb's reputation ... and

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[20] This failure to object independently compels the Court to reject Defendants' present argument as unpreserved. *See, e.g.*, Fed.R.Evid. 103; *Schaafsma*, 802 F.2d at 636; *Palmieri*, 2000 WL 310341, at * 4; *Memorial Drive Consultants, Inc.*, 2001 WL 241781, at * 6; *Hardy*, 52 F.Supp.2d at 340.

they can't now say it's prejudicial for them to be confronted with the acts which they did. And Mr. Cohen is the chairman of the company which hired these individuals to proceed with this and it is directly relevant to malice. It is directly relevant to an award of punitive damages." (Damages Tr. at 295.)

The Court then ruled that the testimony would be allowed given that the Defendants could explain the circumstances of the hiring of this investigator through testimony from Cohen and representatives of IDJ, particularly, whether any of them knew about the hiring of this investigator and the tactics he employed. (Damages Tr. at 296.) The Defendants' counsel then indicated that the Defendants may wish to amend their witness list to include a proper representative of their law firm who could explain the circumstances of the hiring of this investigator, to which the Court indicated that it "will allow that." (Damages Tr. at 297.) Additionally, the Court noted that a limiting instruction could be given making it clear that "if they [the jurors] find punitive damages appropriate, what conduct would be encompassed in that and make clear that there has to be a relationship to the conduct for which liability was found." (Damages Tr. at 296.)

The evidence on this matter was then received, and a limiting instruction was given, to which no objection was raised, explaining that: "The plaintiff has made a request for punitive damages on the contention that the acts of the defendants, for which you found liability, constitute reckless, wanton or malicious conduct. The testimony of the witness is allowed only for the limited purpose of establishing whether or not the defendants may have harbored that state of mind." (Damages Tr. at 383.)

The Court notes that it has previously indicated that one of the bases established by the evidence in support of the jury's finding of malice and gross, wanton, or willful behavior was the arguable manipulation of process by Defendants, namely, their eve-of-trial deliveries of putative CMC Album content and putative eve-of-trial approval of

the Side Letter Agreement. In that context, the Court concluded:

> In other words, a rational jury may construe these actions as continued efforts by the Defendants to frustrate TVT's contractual rights under the Heads of Agreement by forcing TVT to accept, under the guise of mitigation of damages, a rushed CMC Album with no meaningful opportunity by TVT to participate in or comment on its composition. A jury can therefore conclude that the public interest is furthered by punishing, and thus deterring, such conduct to protect the integrity of business dealings as well as to discourage manipulation of legal processes and forums the law creates to fairly resolve civil disputes.

TVT Records, 262 F.Supp.2d at 193. Similarly, the evidence concerning the investigator's conduct would relate to the question of malice and willful or wanton behavior not only to the extent that it informs of Defendants' attitudes about the circumstances surrounding the facts of the liability findings, which occurred less than three months prior to the investigator's communication, but also to the extent that the circumstances indicate a continued attitude of malice and willfulness that could reasonably be inferred from, among other things and as previously indicated, Defendants' actions occurring even as late as the eve of trial.

A limiting instruction to this basic end was given, to which no objection was raised. While neither TVT nor Defendants elicited testimony from Cohen or any IDJ employee regarding the hiring of this investigator, [21] and while Defendants, in the end, chose not to amend their witness list as they had indicated they might, the agency relationship between Cohen and IDJ and their counsel suffices to, if nothing more, raise the possibility advanced by

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[21] The Court's review of the transcript indicates no such questioning, and the Defendants identify none.

TVT that Defendants' might have known about the hiring of the investigator and, perhaps, his tactics. Whether or not Defendants then chose to re-raise the issue to rebut it, or, instead, simply chose, as they apparently did, not to risk reminding the jury of the matter, was a tactical decision on their part. Having weighed these options and chosen the latter approach, they cannot now attempt to also garner the benefit of the path not taken. Whether or not a fuller record on this matter could have been developed is an issue of evidentiary weight that lay squarely within the jury's province as trier of fact. The link to the underlying transaction in these ways was adequate to render the evidence relevant to the issue of malice and willful or wanton behavior. Defendants' motion for a new trial on this basis is therefore denied.

5. *Transactional Counsel for Gotti and Murder Inc.*

IDJ also challenges as unduly prejudicial TVT's questioning of Ron Sweeney, transactional counsel for Gotti and Murder Inc., ("Sweeney") concerning letters to Gottlieb written by Sweeney and addressing purported deliveries of CMC Album materials. In this line of questioning, TVT's counsel explored the circumstances pertaining to the delivery of putative final CMC Album materials by Sweeney—on behalf of Murder Inc.—to TVT, in particular, the fact that this delivery occurred in the form of a letter from Sweeney, a practicing attorney, to TVT, a party to this litigation, despite TVT's counsel's prior direction to Sweeney that Sweeney not contact TVT or Gottlieb without notice to TVT's counsel. (Damages Tr. at 1079-1084.) This questioning was relevant to Sweeney's credibility, particularly, whether he was acting with any bias or interest in favor of Defendants as evinced or implied by his ignoring TVT's counsel's instruction.[22] To the extent that Sweeney's

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[22] Sweeney is licensed to practice law in the State of California. To the extent that he may have violated the rules of professional responsibility that govern lawyers admitted to practice in California, and to the extent that he did so knowingly, such behavior would be relevant to this question

actions may be construed as indicating a bias in favor of Defendants, thus implicating the weight of his testimony, any consequential harm or "prejudice" to Defendants' case is not "undue" as it was outweighed by such probity. Therefore, IDJ's motion for a new trial on this basis is denied.

6. *Comments By TVT's Counsel*

a. *Legal Standard*

Defendants set forth as grounds for a new trial various comments by TVT's counsel during the trial and, particularly, during his closing arguments to the jury during the liability and the damages phases of the trial of this matter. The Second Circuit has repeatedly reiterated the proper response to such challenges, instructing that "[o]bviously, not all misconduct of counsel taints a verdict to such a degree as to warrant a new trial. ... Some misconduct is *de minimis* in the context of the entire trial, and some is promptly dealt with by the trial court's rulings and curative instructions." *Pappas v. Middle Earth Condominium Assoc.*, 963 F.2d 534, 540 (2d Cir.1992) (finding prejudice because "[t]he combination of the overruled objection [to counsel's remark], the absence of a curative instruction, and the giving of only the standard jury charge regarding arguments of counsel could only have left [the jury] with the impression that they might properly be influenced by [the improper argument] in rendering their verdict, and thus its prejudicial effect was enhanced." (citation omitted; internal quotations omitted)). The Circuit Court has similarly explained that

> [t]rial courts possess broad discretion to determine when the conduct of counsel is so improper as to warrant a new trial. Not every improper or poorly supported remark made in summation irreparably taints the proceedings; only if counsel's conduct

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of bias as well on the same theory. While Sweeney ultimately testified that he was not familiar with the applicable ethical rule on the matter, (Damages Tr. at 1082), the inquiry into the matter was not improper.

> created undue prejudice or passion which played upon the sympathy of the jury, should a new trial be granted.

Matthews v. CTI Container Transp. Int'l, Inc., 871 F.2d 270, 278 (2d Cir.1989); *accord Smith v. Nat'l R.R. Passenger Corp.*, 856 F.2d 467, 470 (2d Cir.1988) (citations omitted; internal quotations omitted). While "trial courts possess broad discretion to determine when the conduct of counsel is so improper as to warrant a new trial, ... attorneys also require latitude in formulating their arguments." *Smith*, 856 F.2d at 470 (citations omitted; internal quotations omitted).

Finally, the applicable law recognizes the important role served by sustained objections, which the jury is told to disregard as a matter of course, and curative instructions in response to arguably prejudicial or improper remarks. *See Pappas*, 963 F.2d at 540; *Jerome v. Napolitano*, No. 90 Civ. 0793(LMM), 1993 WL 22700, at *2 (S.D.N.Y. Jan. 26, 1993); *see also Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 848 F.2d 613, 619-20 (5th Cir.1988); *Datskow v. Teledyne Continental Motors Aircraft Prods.*, 826 F.Supp. 677, 687 (W.D.N.Y.1993) ("Jurors are presumed to obey the court's instructions in this regard as in any other."). As the United States Supreme Court has held, "juries are presumed to follow their instructions." *Zafiro v. United States*, 506 U.S. 534, 540-41, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993) (citation omitted; internal quotations omitted); *accord LNC Investments, Inc. v. National Westminster Bank, N.J.*, 308 F.3d 169, 177 (2d Cir.2002); *United States v. Salameh*, 152 F.3d 88, 116 (2d Cir.1998); *Datskow*, 826 F.Supp. at 687.

b. ***Legal Limits on the Size of Punitive Damage Awards***

Cohen argues that the Defendants are entitled to a new trial on the basis of TVT's counsel's remark during his damages phase summation that the law generally permits punitive damages in amounts reflecting single digit

multiples of compensatory damages awards. TVT's counsel's remarked as follows:

> I will submit to you that a range in which under current U.S. laws has been held to be an appropriate range of multiplying the compensatory damages by a factor in order to come to an appropriate punitive damage award is between a one and nine multiple. So you can take any of these compensatory damage numbers and multiply them times somewhere between one and nine to come up with an appropriate punitive damage number for each of these claims.

(Damages Tr. at 1240.) Whatever the extent to which this comment may or may not be inconsistent with the actual law on the matter, its significance is obviated by the Court's specific instruction to the jury immediately after TVT's counsel's summation that it is the Court's explanation of the law, and not those offered by any of the lawyers in the case, that the jury must accept and apply. The Court explained:

> [L]et me just make a few comments by way of clarifications and limiting instructions related to the statements contained in [TVT's counsel's] closing arguments. You may have heard references to what may be factors as to the law on several matters that he may have touched upon. I have previously given instructions to you concerning any statements of counsel as to what the law is. Those statements should be disregarded. I will return to that theme within the course of my instructions and your understanding of what the law is should be [sic] only that which is contained in my instructions and not any references or assertions as to what the law is as made by counsel, neither opening or closing arguments.

(Damages Tr. at 1253.) This instruction was reiterated to the jury in general form on numerous occasions. (*See, e.g.*,

Damages Tr. at 1254-55 ("On these legal matters, you must accept the law as I give it to you. To this end, both counsel have referred to what they construe to be the law. Let me underscore once again as I just [did] a few minutes ago that it is my instructions that you must follow. You must consider the law only as I instruct you and you must disregard any contrary opinion of the relevant law that may be expressed by anyone else, counsel or any member of your panel."); *accord* Liability Tr. at 1950-51.) Under the circumstances, given the Court's specific instruction to disregard TVT's counsel's statement of the law and given its repeated instructions explaining that the sole and proper source of the jury's conceptualization of any applicable law is the Court itself, the Court finds no basis to presume any prejudice from this remark and Defendants' motion for a new trial on this basis is accordingly denied.

c. ***Confidential Information and TVT's Independent Dispute with Prudential Securities Corp.***

IDJ asserts as a basis for a new trial TVT's assertion that a line of questioning concerning a dispute arising out of an independent business transaction between TVT and Prudential Securities Corp. ("Prudential") was improper because it derived from information subject to a confidentiality order. IDJ asserts that TVT's argument that IDJ was in violation of a court order of confidentiality was prejudicial, as was the attendant suggestion that IDJ's' law firm[23] improperly acquired information through its representation of Prudential against TVT.

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[23] The law firm referenced by IDJ's present challenge is Proskauer Rose LLP ("Proskauer Rose"). To be clear, Proskauer Rose represented both IDJ and Cohen through the conclusion of the liability phase of the trial of this matter. Thereafter, Cohen obtained additional counsel from The Dontzin Law Firm LLP (the "Dontzin Firm") and the Law Offices of James M. LaRossa, LLP (the "LaRossa Firm"). Proskauer Rose never withdrew its appearance for Cohen, and references to "the Defendants' counsel" indicate Proskauer Rose in its dual capacity as counsel to both defendants. To the extent that the Court's discussion mentions "IDJ's counsel," the reference is to Proskauer Rose (and its relevant partners or

The Court will discuss the latter assertion first. With respect to the suggestion that IDJ's lawyers improperly acquired information through their law firm's representation of Prudential, once their law firm was identified by the testimony, the two subsequent questions inquiring about "any concern with respect to that representation" were both objected to and sustained. (Damages Tr. at 748.) Accordingly, no answer was given. To the extent that the question posed by TVT's counsel may have been worded so as to possibly suggest or imply an improper exchange of information among lawyers at IDJ's law firm acquired from the separate representation of Prudential against TVT, the Court notes the following. First, such an implication, while conceivably inferable from the wording of the questions, was not explicitly asserted. Second, the Court sustained the Defendants' objections to both questions. Third, no answer was given. Fourth, the Court had repeatedly instructed the jury that arguments of counsel are not evidence. (*See, e.g.*, Damages Tr. at 24, 1256.) Fifth, the Court had already repeatedly instructed the jury to ignore questions for which objections posed are sustained. (*See, e.g.*, Damages Tr. at 29, 1257.) Indeed, the Court's instructions further explicitly stated that "[i]t is the answer that is the evidence and not the question posed," (Damages Tr. at 24), and that the jurors "must not draw any inference or conclusion from any unanswered question," (Damages Tr. at 29). In this context and given these instructions, the Court does not find TVT's questioning to have been prejudicial, and if so, no more than minimally.

Similar considerations also counsel the Court to conclude that the argument by TVT's counsel, set forth in his

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associates) in this narrower capacity, and insofar as the discussion specifies "Cohen's counsel" in the context of damages trial proceedings, the reference is to The Dontzin Firm and the LaRossa Firm (and any relevant partners or associates). Additionally, to the extent that the discussion refers to "Cohen's counsel" in the context of post trial motions filed on Cohen's behalf, because the signatory of these motions is a principal of the Dontzin Firm, it is that firm that is being referenced.

objection to questioning about material he characterized as confidential, was not unduly prejudicial. As a practical matter, TVT's counsel stated that he believed that the use of that information by Defendants' counsel was improper because it was subject to a confidentiality order issued by the New York State Supreme Court, New York County. Defendants' maintain that there was no violation of any such order because the subject matter of this line of questioning appeared in a publically filed civil complaint.

First, the Court notes that neither side has produced a copy of this order or complaint for this Court's review in considering the present issue.[24] Second, what Defendants oppose is the very substance of TVT's objection, namely, that the material addressed by their counsel's questions was subject to a confidentiality order. In other words, Defendants claim that TVT's objection itself caused them prejudice by being asserted. A Court cannot possibly sustain a challenge on prejudice grounds to the substance of an opponent's stated objection absent, perhaps, some showing of bad faith, just because the concern being raised in the objection might have unflattering implications for the questioner. Going forward, doing so would effectively insulate parties from objections challenging and testing the reliability, propriety, and integrity of their evidence offered

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[24] TVT did submit to the Court in a letter dated August 7, 2003 a copy of a letter dated August 10, 2003 from IDJ (signed by Kempler) supposedly indicating that the Defendants did have information in their possession concerning the relationship between TVT and its relevant affiliates and Prudential that, according to TVT, went beyond the information contained in the referenced civil complaint. Nonetheless, the Court notes two points. First, less relevant is whether the Defendants possessed information beyond that contained in the referenced complaint than whether they restricted their questioning at this trial to the information that was contained in the publicly filed document. Second, perhaps ultimately determinative of this issue is whether the confidentiality order mentioned by TVT, which Defendants claimed was nonexistent as characterized, actually prohibited Defendants' use of a body of information that, regardless of its repetition elsewhere, included the actual subject matter of Defendants' questions.

at trial, and that would be anathema to the adversarial process. *See, e.g., Smith*, 856 F.2d at 470 (noting that while "trial courts possess broad discretion to determine when the conduct of counsel is so improper as to warrant a new trial, ... attorneys also require latitude in formulating their arguments." (citations omitted; internal quotations omitted)).

More pointedly, however, the Court notes that Defendants' counsel engaged in a proffer of relevance regarding his line of questioning. It was at the point when he characterized in open court an independent civil complaint filed by TVT so as to allege that one of TVT's lenders was "seizing all of TVT's daily revenues," that TVT's counsel interrupted to express to the Court his disagreement with the characterization and to further indicate his view that the scope of that line of questioning was subject to a confidentiality order. (Damages Tr. at 562.) The Court promptly interrupted the discussion and directed that "[w]e cannot have this in front of the jury." (Damages Tr. at 562.) Even after this direction, Defendants' counsel nonetheless continued, stating "Your Honor, this is outrageous. This is a publically filed complaint [TVT's counsel] filed," necessitating the Court to reiterate: "No more argument." (Damages Tr. at 562.) The outburst about which IDJ complains, then, was prompted by Defendants' counsel's own proffer, which itself was made in open court and repeated even after the Court had ruled on the matter, is no less prejudicial.

While it would have been preferable for TVT's counsel to present his argument at sidebar, the Court notes that TVT's counsel, in the heat of argument, interrupted characterizations by Defendants' counsel likewise made in open court of events not in evidence. As true with respect to TVT's counsel, Defendants' counsel, knowing the sensitive content that was the subject of TVT's continuing objection, also should have articulated his proffer at sidebar. The Court's direction, quoted above, as conveyed in context at trial, was sufficient to remind the jury of its prior

instruction that lawyers are under a duty to raise objections and that their arguments are not to be considered evidence, instructions that were subsequently reiterated during the Court's jury charge as well. (*See, e.g.*, Damages Tr. at 24, 29, 1256, 1257.) Under these circumstances and given the Court's instructions, the Court does not find there to have been any significant prejudice to any party sufficient to warrant a new trial.

d. ***Representations Concerning IDJ's Counterclaims***

IDJ also argues that Defendants were prejudiced by testimony from Gottlieb elicited by TVT's counsel that IDJ's representations, through its counsel—namely, that IDJ would not pursue its counterclaim for tortious interference with contractual relations against TVT if TVT were to release a CMC Album following IDJ's putative consent to the project on the eve of trial—were not reliable. TVT's counsel asked: "Did you believe at any time and do you believe today that you can rely on the representations of IDJ's counsel with respect to your legal rights vis-a-vis IDJ?"(Damages Tr. at 752.) IDJ's counsel interprets the question as an attack on his and his law firm's credibility. The Court disagrees.

The significance, if any, of the question's reference to IDJ's counsel, evident in the preceding questioning, concerns the fact that the counterclaim representation in question was written by IDJ's counsel in reply to a letter addressed by TVT's counsel not to IDJ's counsel but to Murder Inc.'s transactional attorney. (Damages Tr. at 750.) At any rate, there is no basis for a reasonable inference of any suggestion of untrustworthiness on the part of IDJ's counsel as opposed to IDJ itself, for whom counsel was acting as agent in conveying the representation that IDJ would not pursue its counterclaim against TVT. In this vein, Gottlieb testified about the reason why he did not trust the representation, at least in part, asserting that it was not because IDJ's counsel was untrustworthy, but, rather, because despite the fact that the representation was made

as of March 9, 2003, IDJ in fact did pursue its counterclaim against TVT during the liability phase of this litigation which commenced on March 10, 2003. (Damages Tr. at 752.) In this context, it is clear that the discussion of reliability and trustworthiness was directed at IDJ, not at IDJ's counsel which functioned as the agent through which IDJ's representation was conveyed to TVT.[25]

e. ***Enron***

IDJ argues that the jury was unduly prejudiced by TVT's reference during the liability phase to "Enron" and its subsequent references to a "scandal" and "cover up" and to "documents hidden." Initially, the Court notes that the first challenged reference to Enron occurred during TVT's cross-examination of Kempler, who himself first referred to Enron while being questioned on direct examination by the Defendants' counsel to draw a distinction between the actions of IDJ, which stored the signed copy of the Side Letter Agreement in Kempler's office, and Enron, which is popularly associated with destroying potentially incriminating documents. (Liability Tr. at 357 ("But I'm a little bit of a pack rat, I guess, and shredding has sort of bad connotation to me in the post-Enron world.").) During Kempler's direct and cross examinations, he testified to the effect that while IDJ did not destroy the signed copy of the Side Letter Agreement, it did store the document in Kempler's office without disclosing its existence until after the present litigation commenced. Kempler also testified that he crossed out his signature shortly after Ja Rule's employment contract with IDJ was renegotiated in August 2002. (Liability Tr. at 301-305, 315-17.) TVT's counsel mentioned Enron during his liability phase summation in the course of referencing this prior testimony to argue that the jury should reject Kempler's attempt to disavow

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[25] Indeed, just as this representation was contained in a letter from IDJ's counsel, it was directed to, and received on behalf of TVT by, TVT's counsel.

improper or Enron-like behavior by IDJ. (Liability Tr. at 1871-72.)

Furthermore, the related remarks by TVT during summation regarding "hidden documents" referred to the fact that IDJ officials stored this signed copy of the Side Letter Agreement somewhere in Kempler's office despite efforts by TVT and its transactional counsel, Leibowitz, to receive back from IDJ executed copies of this very document, given representations that IDJ had expressed its consent and that delivery of these documents in the summer and fall of 2001 was forthcoming. (Liability Tr. at 301-305.) To convey this point, TVT's counsel stated: "We discovered that the agreement that we thought we had had been signed when we were told it had been signed. But instead of being given back to us, it had been stuck in a drawer or hidden or there had been internal communications between Mr. Cohen saying, 'Hold off, don't give that back to them yet." ' (Liability Tr. at 1872.) This reference, and the one to a "cover up," are particularly tied to the additional point that, while the signed Side Letter Agreement was being kept at IDJ's offices, Kempler had placed a large "X" across his signature sometime in August 2002, days after Ja Rule's (and, earlier, Gotti's) employment contract with IDJ had been renegotiated. In reference to this circumstance, TVT's counsel remarked: "And it is a scandal because in order to cover up this fraud, we now have 'X's put through signatures. We have documents hidden." (Liability Tr. at 1876; *see id.* at 1872-76.)

Under these circumstances, TVT's reference to this document as having been "hidden" is not an unwarranted or unreasonable characterization, as it had a basis in the evidence.[26] The only embellishment in this phrase, then,

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[26] TVT's counsel's explanation, at sidebar following his summation, focused on the latter aspect of this underlying point, namely, the apparent tardiness of the disclosure even following the commencement of litigation and into the discovery process. Nonetheless, this explanation presented in the heat of trial certainly does not contradict what is clear from the

concerns TVT's pluralization of the word, "document," which is not a basis from which to infer meaningful prejudice meriting a new trial. TVT's use of the phrase, "cover up," reflects this same circumstance in which the signed document being pursued by TVT after verbal discussions had occurred was neither delivered nor disclosed, in the face the intervening contract renegotiations with the artists, and, accordingly, arguably hidden and thus arguably "covered up." (Liability Tr. at 1872-76.) Both phrases might have an accusatory tenor, but their underlying substantive point—that the signing of a material document was not disclosed—in the face of a possible ulterior motive—namely, to placate the artists, who had expressed the desire to proceed with the CMC Album project for various reasons—also has a basis in the factual record.[27] Therefore, under the circumstances, the remarks do not reflect an unfounded and infectious degree of prejudice to the Defendants. The Court recognizes that TVT's use of the word, "scandal," is more accusatory than either of the other two phrases, but, again, the underlying events referenced had a basis in the evidence, thus mitigating any prejudicial import of this word in light of the ordinary and reasonably expected heated advocacy and puffery that characterize summations. On balance, the accusatory nature of these remarks do not present the sort of undue prejudice that would require a new trial.

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larger context of the trial and, particularly, TVT's counsel's surrounding statements during summation, all of which make clear that the reference was to Defendants' decision not to return or acknowledge the signed Side Letter Agreement pending the interim developments, after which Defendants assumed the very opposite view to that suggested by that document, namely, that no agreement had ever been reached, orally or otherwise.

[27] For the reasons indicated in the Court's discussions of the sufficiency of the evidence in support of the jury's verdict during the liability phase, that argument concerning motive has ample basis in the record as well. *See TVT Records*, 2003 WL 1858151, at *3-5.

f. *Subornation of Perjury*

While presenting his closing argument during the liability phase, TVT's counsel also accused IDJ's and Cohen's counsel of suborning perjury from Cohen, and IDJ asserts prejudice from this event as a basis for a new trial as well. TVT defends its statement on two principal grounds. First, TVT asserts that a comparison of a sworn declaration by Cohen, in which Cohen states he told Gotti that Gotti "did not have our [IDJ's] permission to deliver or produce Ja Rule recordings to or for TVT," (Declaration of Lyor Cohen dated September 15, 2002, ¶ 19 (admitted into evidence as Plaintiff's Exhibit 50)), and of Cohen's trial testimony, in which he answered "no" to the question posed by Defendants' counsel, who asked, "Have you ever instructed him [Gotti] not to finish the CMC album project for TVT?" indicates an inconsistency providing what TVT regards as a factual basis for its counsel's remark. (Liability Tr. at 1149.) In fact, while it was proper for TVT to impeach Cohen with this inconsistency as a matter of credibility, which in fact TVT did, it was not proper for TVT to comment to the jury that Defendants' counsel suborned perjury, regardless of any apparent inconsistency in the statements, regardless of the somewhat leading question posed by counsel, and regardless of any other evidence that may or may not support the accusation. Counsel's credibility was not relevant to the jury's deliberations, Cohen's was.

Because of the impropriety of TVT's counsel's remark concerning Defendants' counsel, the Court gave a corrective instruction following TVT's summation, in which the Court stated in relevant part:

> The Court does not find in this record such evidence upon which such an accusation would be reasonably justified. I therefore instruct you to entirely disregard [TVT's counsel's] remark as you deliberate on matters you are charged to determine. Like all the statements by counsel in closing arguments, such comments do not

> constitute evidence for your consideration. The Court did not call attention to this matter yesterday in order to assess the record and consider an appropriate response and to discuss the matter with counsel. You're admonished that you're not to draw any inferences whatsoever from the Court's action or obtain [sic] any assumption that the Court in any way endorsed [TVT's counsel's] comment.

(Liability Tr. at 1949-50.) [28]

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[28] TVT's closing arguments during the liability phase concluded at the end of the day on March 18, 2003. While the jury was still present, and just after TVT's summation concluded, the parties approached the bench for a sidebar discussion. In that discussion, counsel for Defendants noted his opposition to the accusation of suborning perjury on his part. In the course of his remarks, and in recognition of the lateness of the hour, counsel for Defendants remarked as follows: "And beyond that, he accused me personally of suborning perjury. That is grounds for a mistrial. I will discuss with my clients and report back to your Honor as to whether we wish to have a mistrial. But the notion that this Court will permit [TVT's counsel] to publically accuse me in front of all these people of subornating [sic] perjury is very difficult to accept. Your Honor has permitted [TVT's counsel] to violate rulings. I would request that your Honor fashion appropriate sanctions, and that tomorrow there be an appropriate instruction and admonition in front of the jury with respect to his accusation of me with respect to the subornation of perjury. I think it's outrageous." (Liability Tr. at 1902-1903.) The Court agreed and excused the jury until the following day, at which time the curative instruction was given. The Court, prior to excusing the jury, did instruct the jury not to commence any deliberations because the presentations of the parties had not concluded. (Liability Tr. at 1901.) In light of this instruction, and given Defendants' own request for a corrective instruction to be given on the following morning, the Court does not find the intervening night between the summation by TVT's counsel and the Court's corrective instruction to be anything more than nominally significant, particularly in light of the Court's own explanation and direction to the jury regarding why no instruction on the matter was given on the previous day.

Incidentally, the Court finds no basis to accept the assertion by Defendants' counsel that the Court had "permitted" TVT's, or indeed any, counsel "to violate rulings."

In the face of this clear and direct instruction to completely disregard TVT's counsel's accusation, the Court does not find the remark, in light of the overall proceedings, so prejudicial as to utterly infect Defendants' presentations and the jury's deliberations in such as a way as to compel a new trial. The Court concluded as much in response to Defendants' motion for a mistrial, which was denied in the midst of these events on the very day after TVT's summation, (Liability Tr. at 1914-16), and now reiterates its conclusions in connection with this ruling.

g. ***Characterization of Materials Delivered for the CMC Album***

IDJ also cites as a basis for finding prejudice requiring a new trial TVT's counsel's exclamation, in objection to questioning by Cohen's counsel regarding whether TVT desired to release the CMC Album, "What CMC Album? What he delivered or something real?" (Damages Tr. at 606.) In context, the relevant exchange between Gottlieb, TVT's counsel, and Cohen's counsel proceeded as follows:

> Question: You don't want this album completed, do you?
>
> Mr. Haviland: Objection, argumentative.
>
> The Court: Recast the question, Mr. LaRossa.
>
> Question: As you sit here now, you don't want the CMC album, do you?
>
> Answer: I think what happened with CMC is a tragedy. I don't think there's ever—
>
> Mr. LaRossa: Can he just answer the question?
>
> The Court: Answer the question.
>
> Answer: The CMC album.
>
> Mr. Haviland: Wants what?
>
> Mr. LaRossa: The CMC Album.
>
> Mr. Haviland: What CMC Album? What he delivered or something real?

(Damages Tr. at 606.) TVT's position—that the deliveries purporting to represent workable materials for the CMC Album were, in fact, not in final form and inadequate to create a marketable album—had already been thoroughly presented to the jury during Gottlieb's direct examination. (*See, e.g.*, Damages Tr. at 407-423.) Furthermore, that position was reasserted by Gottlieb during cross examination seconds before the colloquy presently at issue occurred. (Damages Tr. at 605-606.) The substance of TVT's counsel's question, then, was already in evidence and was nothing new to the jury, as it represented a central tenet of TVT's arguments regarding the Defendants' conduct as relevant to malice and punitive damages. Moreover, Cohen's counsel's reference to a "CMC album," as the excerpt above indicates, was arguably unclear to the extent that it presumed a marketable product in the face of Gottlieb's position that the materials delivered were not in marketable form and that, accordingly, an actual CMC Album did not exist. An objection on grounds of argumentativeness was appropriate, and TVT's counsel made such an objection, which the Court sustained. Cohen's counsel then recast his question as directed, but the ambiguity between whether or not the delivered materials constituted a final product still remained, at which point, TVT's counsel remarked as he did. After some additional wrangling between the parties' attorneys, TVT's counsel properly phrased his objection, stating: "I have an objection to that question, your Honor. It's vague." (Damages Tr. at 608.) Finally, Gottlieb was able to explain the confusion, stating: "To the extent there was an album contemplated under the Heads of Agreement, no such album is currently in existence so I can't answer the question." (Damages Tr. at 608.) Following additional skirmishes between Gottlieb and Cohen's counsel, the Court finally directed Cohen's counsel as follows: "Why don't you give some more specificity as to your definition of 'the album.' " (Damages Tr. at 609.) While TVT's counsel could have raised his objection using more appropriate language, the

circumstances indicate that the distinction between a marketable album (*i.e.*, "something real") and what was actually delivered was glossed by the challenged questioning. The Court finds no notable prejudice in this exchange.

h. *Pattern of Behavior*

Cohen also generally references various elements of the trial record to set forth the proposition that "further improprieties warranting a new trial" exist. (Cohen Br. at 8.) Cohen then, as though he were proceeding *pro se*, string cites various pages in the trial record, offering no particularized basis for his putative challenges. The Court, following Cohen's lead, will not address the various citations to the record individually in search of any possible argument Cohen and his counsel might have intended to make. Rather, the Court has reviewed the contents of the pages cited, in light of the events in the record in their totality, and in this regard finds no meritorious basis for any argument for a new trial.

IDJ similarly argues that the examples it presents as bases for a new trial "are by no means exhaustive of all of [TVT's counsel's] improper conduct. Indeed, [TVT's counsel] engaged in a pattern of prejudicial questioning throughout both trials ...."(IDJ New Trial Br. at 17 n. 13.) The specific instances identified by IDJ are addressed elsewhere in the present Decision and Order. To the extent IDJ seeks to invoke any possible argument in support of a new trial allegedly apparent from the 3,500-page record of the fourteen-day (excluding weekends and jury deliberations) trial of this matter, the Court, taking the Defendants' lead, will generally remark that it has considered all of the parties' arguments and conducted its own independent consideration of the record in its totality and finds no meritorious basis to grant a new trial.

7. *Weight of the Evidence*

a. *Basis for Finding a Breach of the Heads of Agreement*

IDJ argues that the jury's verdict of liability against Defendants for tortious interference with contractual relations is against the weight of the evidence because the Heads of Agreement provided for a November 2001 delivery date for the CMC Album materials, which was missed through no fault of Defendants, rendering any nondelivery in time for a November 2002 release inconsequential as a matter of breach. Even if a breach of the November 2002 anticipated release date is sustainable, Defendants further argue, the decision not to deliver the CMC Album materials in time was a unilateral one made by Gotti himself, without any influence by IDJ or Cohen. Without a basis for a finding of breach, the argument goes, there can be no tortious interference with contractual relations. Third, Defendants set forth the continued intentions of Gotti and Ja Rule to perform their obligations under the Heads of Agreement as weighing against a finding of breach.

With respect to the argument that Gotti and Murder Inc. breached the Heads of Agreement in November 2001, this Court has already identified evidence in support of the conclusion that the parties to that agreement did not treat that nondelivery as a breach. *See TVT Records*, 2003 WL 1858151, at *4. Gotti continued recording material, the recording costs were submitted to TVT, TVT paid those costs, preliminary tracks were delivered by Gotti to TVT, and a photo shoot was arranged to promote the album, all well beyond November 2001 and well into 2002. *Id.* Indeed, Gotti testified that changes in release dates are not unusual in the record industry—a fact repeatedly stressed by Defendants—and that he and Gottlieb subsequently agreed to a November 2002 release date with a delivery date, by implication, sometime in early September. (Liability Tr. at 562-63.)

Rather than setting forth evidence in counterweight to this evidence, Defendants simply assert that "TVT

presented no evidence that the [Heads of Agreement] was ever amended to provide for a new, firm delivery date." (IDJ New Trial Br. at 19-20.) The evidence above, in fact, does establish a clear basis to conclude that the parties to the Heads of Agreement did modify their understanding to establish a November 2002 release date, with delivery sometime in early September 2002. Therefore, the Court rejects the argument that the weight of the evidence compels against a finding of breach of the Heads of Agreement on this theory.

As regards the testimony by Gotti that he made the decision not to deliver the CMC Album materials in time for a November 2002 release, (Liability Tr. at 622), the Court notes several points. First, Gotti's testimony clearly indicates that he has a strong personality. (*See, e.g.*, Liability Tr. at 501.) Admitting deference to others—especially in the context of business decision-making—would appear inconsistent with his uncompromising artistic will and public persona. (Liability Tr. at 501 ("I mean, they're partners with me, but they don't have control over nothing for Murder Inc. ... I don't know my joint venture says [sic] to the letter. But I know how we operate, and how we operate is I call the shots and they ride with what I say.")) Cohen himself acknowledged as much when explaining how delicate he had to be in voicing objections to Gotti's plans and ideas. (*See, e.g.*, Liability Tr. at 1043, 1083.) Yet, at the same time, Gotti testified that, given his business relationship with IDJ, he could not go forward with the CMC Album project with TVT absent the Defendants' consent. (Liability Tr. at 488.)

In short, given these personal and professional traits, were Gotti to yield to others as regards business or artistic decisions, he is not likely to admit it publicly. This quality somewhat undermines the ultimate weight the Court reasonably accords this aspect of Gotti's testimony, particularly when considered against evidence suggesting that, in fact, when it chose to do so, IDJ did have and exercised artistic and business control with regard to the

joint venture. For example, Cohen's own testimony indicates that, at least as of April 2003, he was the person "driving" the putative completion of the CMC Album project. (Damages Tr. at 322.) Gottlieb testified that the most recent purported delivery of CMC Album materials on the eve of the damages phase contained content that did not, in his experience, reflect Gotti's fullest work, nor did they correspond to the set of CMC Album recordings deposited with the Court in February 2003. (Damages Tr. at 419, 691.) Additionally, TVT in and around April 2003 had received correspondences not from Gotti but from Kempler—on IDJ letterhead and signed on behalf of "M.I. Records, L.L.C."—addressing various matters, including which artists and songs would appear on the CMC Album, and effectively confirming that Defendants, and not Gotti alone, were controlling the production of the CMC Album. (Damages Tr. at 412-14; Plaintiffs' Ex. 331, 332.) On balance, it is reasonable not to fully credit Gotti's assertion that he exercised complete control over business and artistic decisions concerning the CMC Album project.

In contrast, the evidence of Defendants' participation in the decision to delay the CMC Album's release and, indeed, prevent it altogether, is compelling. In addition to the evidence recounted above, evincing Defendants' more recent exercise of artistic and business control over the CMC Album project, more direct evidence includes, among other things: Cohen's statement that he had told Gotti that, at least as of late summer 2002, Gotti "did not have our [IDJ's] permission to deliver or produce Ja Rule recordings to or for TVT," (Declaration of Lyor Cohen dated September 15, 2002, ¶ 19 (admitted into evidence as Plaintiff's Exhibit 50)); and IDJ's August 14, 2002 letter to Leibowitz and TVT purporting to reject the Side Letter Agreement and refusing to permit Ja Rule and Gotti, who were under exclusive contract with IDJ, to participate in the CMC Album project. On balance, the Court does not conclude that the jury's finding of interference and breach of

the Heads of Agreement induced by Defendants is against the weight of the evidence.

Finally, whether or not the Artists continue to be willing to satisfy their obligations under the Heads of Agreement is immaterial in light of the evidence, reiterated above and in response to Defendants' Rule 50(a) motions, *see TVT Records*, 2003 WL 1858151, at *1-3, that the Heads of Agreement was breached and that such breach was induced by Defendants. IDJ's motion for a new trial on this basis is accordingly rejected as well.

b. ***Economic Justification***

IDJ also argues that IDJ, and Cohen acting on IDJ's behalf, were justified in interfering with the Heads of Agreement in light of their superior economic interest in the Artists, who were under exclusive services agreements with IDJ, and that the weight of the evidence compels this result. This argument misdefines the issue. First, the Court notes that the evidence at trial indicates that the vast majority of recording artists are bound by exclusivity arrangements with record companies and that, nonetheless, guest appearances or similar cooperative efforts, some sought and routinely approved by IDJ itself, are extremely common in the industry. *See TVT Records*, 2003 WL 1858151, at *4. The CMC Album project was no threat to IDJ's exclusivity agreements because it was one such comparable exception to these arrangements. Furthermore, TVT recognized IDJ's exclusivity rights, and, accordingly required through the Heads of Agreement, that Gotti, Ja Rule, and Murder Inc. obtain any necessary clearances from IDJ. TVT also, in this vein, pursued and, according to the jury, formed, the Side Letter Agreement with IDJ precisely to secure such permission. Accordingly, the CMC Album project is not inconsistent with IDJ's contractual relationships with the artists. Moreover, given IDJ's arrangement with TVT to share in the proceeds from the CMC Album, given the similar financial interest of one of IDJ's business partners (Gotti); and the feelings of personal loyalty expressed by IDJ's exclusive artist (Ja Rule) motivating him to pursue

the CMC Album project, IDJ's interest would appear to be intertwined with the production of the CMC Album rather than inconsistent and superior to it. The weight of the evidence does not, therefore, warrant a new trial on the basis of IDJ's superior economic interest defense.

Independently, even if IDJ were to establish a superior economic interest in the matter, the jury's findings of fraud and of malice by the Defendants, findings which this Court has sustained on the evidence, *see TVT Records*, 244 F.Supp.2d at 275-77 (fraud); *TVT Records*, 2003 WL 1858151, at *4-5 (fraud); *TVT Records*, 262 F.Supp.2d at 191-93 (malice),[29] would compel a fact-finder to reject this defense. *See, e.g., MDC Corp., Inc. v. John H. Harland Co.*, 228 F.Supp.2d 387, 397 (S.D.N.Y.2002) ("Where the defendants have an economic interest in the contract ... liability will be imposed only where plaintiff can make a showing of malice on the one hand or fraudulent or illegal means on the other."); *Foster v. Churchill*, 87 N.Y.2d 744, 642 N.Y.S.2d 583, 665 N.E.2d 153, 157 (1996) ("The imposition of liability in spite of a defense of economic interest requires a showing of either malice on the one hand, or fraudulent or illegal means on the other.").

c. ***Validity of the Copyright Licenses for Use of "The Rain" and "Get Tha Fortune"***

IDJ next argues that the jury's finding that IDJ's licenses for use of "The Rain" and "Get Tha Fortune" were invalid because they were obtained fraudulently was against the weight of the evidence. IDJ claims the benefit of the license for "The Rain" that TVT granted to Gotti, as IDJ was the distributor of the "Irv Gotti Presents: The Inc." materials. (*See, e.g.*, IDJ New Trial Br. at 23 n. 17.) IDJ also received a written license to use "Get Tha Fortune."

The jury found Defendants liable for copyright infringement despite these licenses because, implicitly, it sustained TVT's theory that the licenses were procured by

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[29] *See also* section II.B(3) *supra*.

fraud, namely, that Defendants from the start fraudulently concealed their intent not to permit Ja Rule and Gotti to create and deliver to TVT materials for the CMC Album. (See Jury Verdict Sheet dated March 21, 2003, Question Nos. 9-22.) In asserting its present argument, IDJ posits that there is no evidence that IDJ knew that TVT would not have granted the licenses if it knew that IDJ never intended to permit the Artists to contribute to the CMC Album as it had previously agreed to do, according to the jury (*see* Jury Verdict Sheet dated March 21, 2003, Question No. 1 (IDJ liable for breaching the Side Letter Agreement)). IDJ also argues, with respect to the license for "Get Tha Fortune," that while Gottlieb and Bryan Leach testified that TVT would not have granted this license under the circumstances, they never conveyed that message to the people within the company responsible for granting such clearances.

The evidence, however, indicates the very opposite. Specifically, the record sufficiently supports a finding that while TVT's director of business and legal affairs, Jacqueline Sussman ("Sussman"), who oversaw permissions and copyright clearances for TVT, did not have a direct conversation with Gottlieb, one of her subordinates, Manny Lorenzo, ("Lorenzo") did. Gottlieb told Lorenzo that he (Gottlieb) approved of the request by IDJ for permission to use "Get Tha Fortune," and Lorenzo conveyed that fact to Sussman, who, in turn, executed the license. (Liability Tr. at 1653, 1665.) Gottlieb himself testified that he granted the license, for a $5,000 fee, because he understood IDJ to have consented to the CMC Album project months earlier. (Liability Tr. at 1481, 1488.) Indeed, Sussman testified that when she was informed by Lorenzo that Gottlieb had approved the request for the fee to be fixed at $5,000, she believed the fee was unexpectedly low but presumed that Gottlieb must have granted permission in exchange for that amount given IDJ's collaboration with the CMC Album. (Liability Tr. at 1665.) Gottlieb also testified that the same consideration led him to consent to Gotti's use of "The Rain"

on the "Irv Gotti Presents: The Inc." CD. (Liability Tr. at 1490.)

Conversely, the evidence more broadly indicates that Ja Rule and Gotti are exceedingly popular artists, that the CMC Album would have been TVT's major release for 2002 and, indeed, likely the most successful hip hop genre release ever for the company, and that there had been rather heated negotiations between TVT and IDJ, including at least one conversation between Gottlieb and Cohen directly, regarding terms of the collaboration. (See, e.g., Liability Tr. at 1462-65, 1463-64, 1482-83, 1486-87.) Under these circumstances, it is reasonable to infer that had Defendants not concealed their intent not to consent to the CMC Album project—that is, had they expressed clearly their refusal to permit Gotti and Ja Rule to collaborate with TVT, thereby stopping the project—Gottlieb, once presented with IDJ's request just months later, would not turn around and help IDJ with one of its own projects, especially in light of the circumstance that the recordings for which IDJ sought TVT's license included material developed specifically for the CMC Album. The reasonableness of this inference also counsels against IDJ's former argument, namely, that no one at IDJ knew Gottlieb and TVT would have denied the license requests had IDJ not consented to the CMC Album project. At bottom, IDJ should reasonably have known that if it effectively terminated one of TVT's biggest projects (the CMC Album), that TVT would not, months later, turn around and help IDJ with one of its own (the "Irv Gotti Presents: The Inc." releases).

D. *TVT'S MOTION FOR RETURN, RECALL, AND DESTRUCTION OF INFRINGING MATERIALS*

TVT seeks from this Court an order directing IDJ to (1) turn over to TVT the master recordings of "The Rain" and "Get Tha Fortune" used in connection with the creation of the "Irv Gotti Presents: The Inc." CD and DVD; (2) issue a notice of recall to its retailers; and (3) destroy all copies of these materials that are returned by retailers and that

remain in IDJ's possession or control. IDJ argues that such relief is not warranted under the circumstances of this case. The Court agrees in part with both parties.

Section 503(b) of the Copyright Act provides:

> As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

17 U.S.C. § 503(b). This statute vests the Court with broad discretion to fashion appropriate equitable relief, and is a discretionary provision of the Copyright Act. *See Rogers v. Koons*, 960 F.2d 301, 313 (2d Cir.1992); *Love v. Kwitny*, 772 F.Supp. 1367, 1374-75 (S.D.N.Y.1991). TVT correctly argues, in support of its application for injunctive relief under § 503(b), that there exists presumption of irreparable harm in copyright infringement cases, *see e.g., Merkos L'inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 96 (2d Cir.2002); *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 64 (2d Cir.1996); *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 192 (2d Cir.1985); however, relief under § 503(b) also requires a balance of equities in the movant's favor. *See Koons*, 960 F.2d at 313; *Basquiat v. Baghoomian*, No. 90 Civ. 3853(LJF), 1992 WL 125529, at *3 (S.D.N.Y. May 22, 1992); *see, e.g., Love*, 772 F.Supp. at 1375 (injunction under § 503(b) denied due to insufficient showing of harm or need). The balance of equities in this case counsel against issuing an order of recall and destruction.

The Court notes the following salient points in arriving at this conclusion. First, TVT has been awarded compensatory and statutory damages, respectively, for the Defendants' infringement of "The Rain" and "Get Tha Fortune" in the aggregate amount of $559,375.00. The

jury's computation of these figures was informed by expert testimony on behalf of TVT reflecting damage estimates for the number of units of each product manufactured. The evidence was not restricted to the number of units sold, and there is no evidence that additional units have been manufactured since that testimony was received. Second, IDJ indicates that only approximately 8,000 units of the infringing products, together, remain in circulation. (Declaration of James Weatherson dated July 16, 2003, ¶ 2.) Third, other than "The Rain" and "Get Tha Fortune" on the CD and DVD, respectively, the remaining works appearing on these releases are original and noninfringing. The CD contains 13 other tracks, and "The Rain" comprises only four of seventy-eight minutes of content. (Damages Tr. at 922-23.) The DVD contains approximately two hours of content, of which "Get Tha Fortune" comprises only approximately four minutes. (Damages Tr. at 936.) Fourth, while the Defendants did make use of TVT's copyrighted materials without permission, there is no misattribution of authorship. It is clear to consumers that "The Rain" and "Get Tha Fortune," as appearing on the "Irv Gotti Presents: The Inc." CD and DVD, reflect the work of CMC, Ja Rule, and Gotti. Similarly, these Artists obviously expended their own time and energy in creating these works, and the impact of recall and destruction warrants some consideration insofar as it may affect them. In light of these circumstances, the Court is not persuaded that the disruption of the marketplace and the burden and expense to IDJ that recalling and destroying the remaining infringing units represents are warranted.

Nonetheless, the Court does recognize that IDJ and TVT are competitors in the marketplace to some extent, and that IDJ did misappropriate copyrighted works belonging to TVT on IDJ's own releases, releases that continue—albeit in limited numbers—to exist in the marketplace. The Court also recognizes that, with regard to the master recordings of "The Rain" and "Get Tha Fortune" used to create, in part, the "Irv Gotti Presents: The Inc." CD and DVD, no further

lawful use by IDJ of these materials can occur, absent TVT's permission, given TVT's copyright interest.

On balance, the Court concludes that these circumstances make appropriate an order, which the Court hereby imposes, restraining Defendants from any future production of the "Irv Gotti Presents: The Inc." CD and DVD to the extent that any such future production would include either "The Rain" or "Get Tha Fortune." The Court agrees with Defendants, who consent to such an order, (*see* The Island Def Jam Music Group's Memorandum Of Law In Opposition To TVT's Request For An Order For Recall And Destruction dated July 18, 2003 at 8), that this is a far more equitable alternative to recall and destruction and best serves the interests of all parties. Additionally, the Court finds the nominal burden of returning to TVT its protected works as embodied in all master recordings used to create the infringing CD and DVD outweighed by the overlapping presence of TVT and IDJ in the marketplace and the continued circulation of the infringing CD and DVD, and, in the interests of equity and fairness, the Court accordingly grants TVT's request for return of these master recordings. *See, e.g., Richard Feiner and Co., Inc. v. Passport Int'l Prods., Inc.*, No. 97 Civ. 9144(RO), 1998 WL 437157, at *3 (S.D.N.Y.1998) (granting, among other relief, permanent injunction and return of master tape).

E. ***TVT'S MOTION FOR PREJUDGMENT INTEREST***

TVT requests prejudgment interest on the jury's award of damages pursuant to TVT's copyright infringement claims, and also requests that the Court fix the date on which prejudgment interest will accrue as to both the copyright infringement awards and the awards pursuant to TVT's claims under New York law. Defendants oppose the request for prejudgment interest as to either category of awards, maintaining that prejudgment interest in the copyright infringement context is not warranted by the circumstances of this case, and that TVT's request as to the

common law claims is premature in light of the Court's order of remittitur.

Regarding the latter argument, Defendants claim that prejudgment interest would commence on the date that TVT either accepts remittitur or opts for a new trial on damages in the alternative. This contention is legally erroneous. In actuality, prejudgment interest accrues irrespective of remittitur. *See Stratton v. The Dep't for the Aging for the City of New York*, 132 F.3d 869, 876, 882 (2d Cir.1997) (full amount of prejudgment interest accruing through date of entry of judgment was awarded despite subsequent order and acceptance by plaintiff of remittitur); *Novomoskovsk Joint Stock Co. "Azot" v. Revson*, No. 95 Civ. 5399(JSR), 1999 WL 767325, at *3 (S.D.N.Y. Sept.28, 1999) (ordering that "plaintiff shall recover against defendants ... jointly and severally, in the amount of $3,543,072.17 ... on plaintiff's fraud claim [which] represents the remitted fraud award of $2,482,333.61 plus $1,060,738.56 prejudgment simple interest calculated at a rate of nine percent per annum for the period from April 1, 1994 to December 29, 1998 [the date when judgment was entered]."); *United States v. Morganti, Inc.*, 163 F.Supp.2d 174, 202 (E.D.N.Y.2001) (same).

With respect to TVT's copyright claims, while the Copyright Act is silent on the matter of prejudgment interest, federal Courts of Appeals have held that such interest may be recovered. *See, e.g., McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 572-73 (7th Cir.2003) (noting presumption of prejudgment interest for federal law violations and affirming award of such interest on damages for willful copyright infringement); *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1040-42 (10th Cir.1990) (noting presumption of prejudgment interest for federal law violations, stating that "it would be 'anomalous' to hold that a plaintiff would be entitled to recover profits flowing from infringement but not revenue generated by the use of the profits," and holding: "we pronounce the rule that prejudgment interest is available to plaintiffs under the

Copyright Act."); *see also Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1551-52 (9th Cir.1989) (holding that "prejudgment interest ordinarily should be awarded" on damages pursuant to claims under the Copyright Act of 1909, 17 U.S.C. §§ 1 *et seq.* (1976 ed.) (superceded by the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.*)). The theory underlying prejudgment interest is not only to fully compensate a copyright owner for the misappropriated value of its property but also to avoid unjust enrichment by defendants, who would otherwise benefit from this component of profit through their unlawful use of another's work. *See McRoberts Software, Inc.*, 329 F.3d at 572; *Kleier Advertising, Inc.*, 921 F.2d at 1041; *Frank Music Corp.*, 886 F.2d at 1552. Courts of this District have accordingly granted prejudgment interest on awards for claims of copyright infringement, and they have done so irrespective of whether the underlying recovery is comprised of statutory damages [30] or of actual damages plus profits attributable to the infringement. *See, e.g., Softel, Inc. v. Dragon Med. & Scientific Comms., Ltd.*, 891 F.Supp. 935, 945 (S.D.N.Y.1995) (prejudgment interest on actual damages award); *Broadcast Music, Inc. v. R. Bar of Manhattan*, 919 F.Supp. 656, 661 (S.D.N.Y.1996) (prejudgment interest on statutory damages award);

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[30] IDJ contends that the theory of fully restoring a copyright owner to its rightful position and fully extracting the benefit of a defendant's misappropriation, which counsels awarding prejudgment interest, does not apply to statutory damages or to situations where actual damages include a component of a defendant's profits rather than merely the copyright owner's lost profits. The distinction, however, is unpersuasive. Each approach seeks to approximate the value of the misappropriated work, and because interest on that value exists however approximated, it belongs to the rightful beneficiary of that value—the copyright owner—rather than the infringer. To the extent that statutory damages may properly include a component of punishment and deterrence in addition to compensation, and because no apportionment of such an award as between compensatory ends on the one hand and punishment and deterrence on the other is required by the Copyright Act, the benefit of the doubt belongs with the copyright owner rather than the infringer.

Dumas v. Dagl, No. 88 Civ. 2293(LBS), 1990 WL 258343, at *6-7 (S.D.N.Y. May 22, 1990) (prejudgment interest ordered prior to election of actual or statutory damages); *RSO Records, Inc. v. Peri*, 596 F.Supp. 849, 864 (S.D.N.Y.1984) (same).

In the case at bar, while Defendants correctly point out that TVT has been awarded compensatory and statutory damages, respectively, for Defendants' infringement of "The Rain" and "Get Tha Fortune" in the aggregate amount of $559,375.00, that figure, as reflected in the case law discussed above, is an approximation of the value of these works belonging to TVT. Defendants, according to the jury's verdict, misappropriated these works and derived a benefit comprised not only of this value but also of the interest thereon, of which, accordingly, TVT was also wrongly deprived. The Court has been presented with no reasonable basis, and itself finds none, to allocate this margin of benefit to the infringers over the copyright owner, particularly in light of the jury's findings of willfulness and malice and their underlying evidentiary bases addressed by the Court in Sections II.B(4) and II.B(6) *supra*.

Additionally, in determining whether to award prejudgment interest on awards for copyright infringement claims, courts have considered relevant the plaintiff's willingness to prosecute the infringement expeditiously. *See, e.g., In Design v. K-Mart Apparel Corp.*, 13 F.3d 559, 569 (2d Cir.1994) (affirming denial of prejudgment interest, noting "the lack of any initiative on [the copyright owner's] part to shorten this litigation."), *abrogated in part on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533-34, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994); *Antenna Tel. v. Aegean Video Inc.*, No. 95 Civ. 2328 ERK, 1996 WL 298252, at *14-15 (E.D.N.Y.1996) ("Factors considered by the Second Circuit ... included the size of the award and the plaintiff's willingness *vel non* to prosecute the action expeditiously.").

On this point the Court notes that TVT has consistently attempted to expedite the ultimate resolution of this dispute. For example, IDJ sent TVT its purported rejection of the Side Letter Agreement in a letter dated August 14, 2002, and TVT commenced this lawsuit promptly on August 20, 2002. TVT requested a preliminary injunction hearing one week later. (Proposed Order To Show Cause dated August 28, 2002 at 1-2.) At the conclusion of this hearing, TVT requested the earliest possible trial date available. (*See, e.g.*, Sept. 30, 2002 Hearing Transcript ("PI Tr.") at 506, 515 (TVT's counsel accepts October 28, 2002 proposed trial date over November 4, 2002, despite a prior commitment, explaining: "given the urgency to my client, I will cancel my engagement in this conference. From our vantage point, it's necessary to proceed as soon as possible."))

Defendants, by contrast, appealed the Court's preliminary injunction order, seeking—at least in part—to delay the trial date. (The Island Def Jam Music Group's Memorandum Of Law In Opposition To TVT's Motion For Attorneys' Fees dated July 18, 2003 at 6 (noting TVT's "unwarranted request for an expedited trial that led to defendants' appeal ...."); Letter to the Court from Michael Mervis dated October 15, 2002 at 3; Letter to the Court from Michael Mervis dated October 9, 2002 at 1-2.) While this appeal was denied, *see TVT Records v. The Island Def Jam Music Group*, No. 02-9203, slip op. at 1 (2d Cir. Nov. 15, 2002), the temporary stay of proceedings imposed by the Circuit Court while it explored the merits of the application, coupled with independent intervening developments affecting the Court's trial calendar, resulted in a considerably later trial date. TVT was also willing to waive its right to a trial by jury in order to expedite the final resolution of this dispute through a shorter bench trial. (PI Tr. at 515.) Also, when the damages phase was being scheduled at the conclusion of the liability phase, TVT requested that the damages phase commence immediately, while Defendants objected on various grounds, urging a

five-week delay. *See TVT Records*, 254 F.Supp.2d at 330-31. TVT's expeditious prosecution of its case, which is reflected in these examples, also persuades the Court to award prejudgment interest in this matter.

Turning to the matter of determining the proper date on which prejudgment interest begins to accrue, TVT requests that the Court set this date to be March 21, 2003, the date the jury rendered its verdict of liability against the Defendants. TVT correctly recognizes that it is entitled to accrual as of an earlier date. (TVT's Reply Memorandum Of Law In Further Support Of Its Request For An Order Setting A Date Of Accrual Of Interest dated August 1, 2003 ("TVT PJI Reply Br.") at 8.) Under New York law, prejudgment interest on TVT's common law claims is available as of the date each cause of action accrued. *See, e.g.*, N.Y. Civ. Prac. L. & R. ("NY CPLR") § 5001(a);[31] NY CPLR § 5001(b);[32] *Baker v. Dorfman*, 239 F.3d 415, 425 (2d Cir.2000) ("Courts applying [NY CPLR] § 5001(a) have without qualification awarded interest as a matter of right whenever any tortious conduct causes pecuniary damage to tangible or intangible property interests." (citation omitted; internal quotations omitted)); *Tosto v. Zelaya*, No. 99 Civ. 11864, 2003 U.S. Dist. LEXIS 8085, at *23-24 (S.D.N.Y. May 12, 2003) (prejudgment interest on recovery for fraud is available when the cause of action accrues); *Stanford Square, L.L.C. v. Nomura Asset Capital Corp.*, 232 F.Supp.2d 289, 291-94 (S.D.N.Y.2002) (awarding prejudgment interest on award for breach of contract as of the

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[31] NY CPLR § 5001(a) provides: "Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, ..."

[32] NY CPLR § 5001(b) provides: "Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date."

date the cause of action accrued). Similarly, prior decisions of this District have awarded prejudgment interest for copyright infringement awards as of the date of first infringement or as of the date the action was commenced. *See, e.g., Broadcast Music, Inc.*, 919 F.Supp. at 662 n. 2 (prejudgment interest on copyright infringement award calculated from date of infringement); *Bourne Co. v. Walt Disney Co.*, No. 91 Civ. 0344 (LLS), 1994 WL 263482, at *3 (S.D.N.Y. June 10, 1994) (same); *Dumas*, 1990 WL 258343, at *6 (prejudgment interest accrues as of the date the action was commenced); *RSO Records, Inc.*, 596 F.Supp. at 864 (same).

Nonetheless, TVT explains that "[t]o avoid extended litigation on a relatively ancillary issue, TVT's request errs on the side of being too late a date for the accrual of interest, rather than too early." (TVT PJI Reply Br. at 8.) TVT's decision to err on the side of caution in this way obviates the need for the Court to determine when TVT's various causes of action under New York law accrued and whether, in the exercise of its discretion, to set an earlier date regarding the copyright claims.[33] Accordingly, prejudgment interest on the entire award will accrue from March 21, 2003 through the date judgment herein was entered by the Clerk of

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[33] The preceding discussion of the circumstances and jury findings counseling the Court to award prejudgment interest certainly supports this conservative request for accrual as of the date of the jury's liability verdict.

Additionally, the bifurcated trial in this matter presents no basis to deviate from the approach dictated by the preceding authority. *See* N.Y. CPLR § 5002 ("Interest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment."); *Love v. State of New York*, 78 N.Y.2d 540, 577 N.Y.S.2d 359, 583 N.E.2d 1296, 1298-99 (1991) ("In a bifurcated trial, the plaintiff's right to be made whole becomes fixed when the verdict holding the defendant liable is rendered. ... Accordingly, it follows that, if plaintiffs are to be fully compensated for their losses in bifurcated trials, prejudgment interest must be calculated from the date that liability is established ....").

Court. Prejudgment interest on TVT's awards pursuant to its common law claims will accrue at a rate of nine percent per annum, *see* N.Y. CPLR § 5004, and prejudgment interest on TVT's awards pursuant to its copyright infringement claims will accrue in accordance with the rate and procedure set forth in 28 U.S.C. § 1961(a),[34] *see, e.g., Bourne Co.*, 1994 WL 263482, at *3.[35]

IV. *CONCLUSION AND ORDER*

For all of the foregoing reasons, it is hereby

ORDERED that Defendants' motions for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure are DENIED; and it is further

ORDERED that Defendants' motions for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure are DENIED, subject to the Court's ruling on the Defendants' motion for remittitur as set forth in the accompanying Decision and Order; and it is further

ORDERED that TVT's motion for return, recall, and destruction of infringing materials is GRANTED IN PART and DENIED IN PART; and it is further

ORDERED that Defendants are directed to return to TVT all embodiments within their possession, custody, or control of "The Rain" and "Get Tha Fortune" on all master recordings used to create the "Irv Gotti Presents: The Inc." CD and DVD within thirty (30) days of the date of this Decision and Order; and it is further

ORDERED that Defendants are permanently enjoined and restrained from engaging in any future production of the "Irv Gotti Presents: The Inc." CD and DVD to the

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[34] TVT requests this calculus, and the Defendants do not dispute it.

[35] The parties' arguments and TVT's present motion address matters relating to prejudgment interest only. Accordingly, nothing in the Court's present Decision and Order should be construed as foreclosing recovery of post judgment interest on the entire award to the extent otherwise available and, indeed, mandatory under 28 U.S.C. § 1961. *See Lewis v. Whelan*, 99 F.3d 542, 545 (2d Cir.1996); *Indu Craft, Inc. v. Bank of Baroda*, 87 F.3d 614, 619 (2d Cir.1996).

extent that any such future production would include either "The Rain" or "Get Tha Fortune;" and it is further

ORDERED that TVT's motion for recall and destruction of infringing materials, namely, the "Irv Gotti Presents: The Inc." CD and DVD, is DENIED; and it is further

ORDERED that TVT's motion for prejudgment interest is GRANTED; and it is further

ORDERED that prejudgment interest on all awards shall accrue as of March 21, 2003, the date of the jury's liability verdict, through the date judgment herein was entered by the Clerk of Court; that prejudgment interest on TVT's awards pursuant to its claims under New York law shall accrue at the statutory rate of nine percent per annum; that prejudgment interest on TVT's awards pursuant to its copyright infringement claims shall accrue in accordance with the procedure set forth in 28 U.S.C. § 1961(a); and that such interest is to be calculated by the Clerk of Court.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:	12/30/05
Docket Number:	03-9026-cv
Short Title:	TVT Records v. Island Def Jam
DC Docket Number:	02-cv-6644
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Victor Marrero

[UNITED STATES COURT OF APPEALS]
[FILED]
[JAN 3 2006]
[Roseann B. MacKechnie, CLERK]
[SECOND CIRCUIT]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of January two thousand six.

TVT Records v. Island Def Jam	03-9026-cv(L), 03-9046-cv(CON), 03-9122-cv(CON), 03-9258-cv(CON)

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Plaintiff-Counter-Defendant-Appellee TVT Records and Plaintiff-Appellee TVT Music, Inc.. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie,
Clerk

By: /s/ Tracy W. Young
Motion Staff Attorney

Supreme Court, U.S.
FILED
MAY 26 2006

No. 05-1239

IN THE

Supreme Court of the United States

TVT RECORDS and TVT MUSIC, INC.,

Petitioners,

v.

THE ISLAND DEF JAM MUSIC GROUP
and LYOR COHEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT THE ISLAND DEF JAM MUSIC GROUP

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QUESTION PRESENTED

Whether a court of appeals lacks power to consider a purely legal ground for judgment that has been presented in a party's answer, repeated at the summary judgment stage, in the joint pretrial order, in the party's pretrial memorandum, and in requested jury instructions, and has actually been decided by the District Court in passing upon these matters and upon the defendants' Rule 50(a) motion, because the ground was not explicitly repeated in the Rule 50(a) motion.

STATEMENT PURSUANT TO RULE 29.6

Respondent, The Island Def Jam Music Group ("IDJ"), is a division of UMG Recordings, Inc. UMG Recordings, Inc. is wholly owned by Polygram Holding, Inc., a Delaware corporation, which is wholly owned by Universal Music Group, Inc., a Delaware corporation. Vivendi S.A., a publicly held French company, is the indirect ultimate parent of Universal Music Group, Inc.

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COUNTER-STATEMENT OF THE CASE

The purported predicates for TVT's petition for certiorari do not exist. The Second Circuit neither found that IDJ had waived its "stranger to the contract" (or "single contract") tortious interference argument in the district court nor excused IDJ's supposed non-compliance with Rule 50 on the basis of a purported "legal question" exception to Rule 50. In rejecting Petitioners' "perfunctory contention" that Respondents had waived this argument (which was dispositive of TVT's tortious interference claim), the Second Circuit noted that Respondents had raised it in their answer, at summary judgment, in the joint pretrial order, in their pretrial brief, and in their jury instruction requests, and that it had been explicitly addressed by the District Court in its decisions denying summary judgment and IDJ's Rule 50(a) motion for judgment as a matter of law. (Pet. App. 8a n.4).[1] In discussing waiver and compliance with Rule 50, the Second Circuit never mentioned the purported "legal question" exception that is the premise for this petition.

There is likewise no "deep and important circuit split" as to whether "appellate review of a jury verdict is limited to issues raised in a Rule 50(a) motion and renewed at the Rule 50(b) stage." (Pet. at 3, 12). All the Courts of Appeals – including the allegedly strict constructionist First, Third, Fourth and Fifth Circuits cited by Petitioners (Pet. at 3, 12, 21-25) – have acknowledged that they have "the power in an exceptional case, to resolve an issue not passed on below," (*Mainegeneral Medical Center v. Shalala*, 205 F.3d 493, 500 (1st Cir. 2000) (citation omitted); *Weaver v. Bowers*, 657 F.2d 1356, 1361 (3d Cir. 1981), *cert. denied*, 455 U.S. 942 (1982)

1. Citations to "Pet. App." refer to the Second Circuit and District Court decisions contained in Petitioners' Appendix.

("the courts of appeals also have inherent power to reach issues although not timely raised below")), particularly where the aggrieved party received the functional equivalent of Rule 50 notice. *See Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 519 n.18 (3d Cir. 1998) (Third Circuit does "not measure [a Rule 50(a) motion's] sufficiency by the text alone, but against the background, as reflected in the record, of what the party now claiming waiver understood as to the tenor of the Rule 50 movant's position and theory"); *Singer v. Dungan*, 45 F.3d 823, 828-829 (4th Cir. 1995) (excusing failure to renew JMOL motion where "the spirit behind Rule 50 was served in that . . . the opposing party had notice of the alleged error so as to cure any defect"); *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 471 (5th Cir. 1999) (Fifth Circuit has "not required strict compliance with Rule 50(b) and has excused technical noncompliance where the purposes of the requirement have been satisfied") (citation omitted).

Similarly, this Court has never held, in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 126 S.Ct. 980 (2006), or in any other decision, that "appellate review of a jury verdict is not permitted except on grounds expressly raised in a preverdict motion pursuant to Rule 50(a) *and* renewed in a postverdict Rule 50(b) motion." (Pet. at 11) (original emphasis). To the contrary, this Court has stated:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue

> not passed on below, as where the proper resolution is beyond any doubt . . . or where "injustice might otherwise result."

Singleton v. Wulff, 428 U.S. 106, 120 (1976) (citations omitted). *Unitherm* has no applicability here, because in that case *the respondent filed no post-verdict motions as to liability whatsoever*. This Court held that, in that context, "there was no basis for review of respondent's sufficiency of the evidence challenge in the Court of Appeals." *Unitherm*, 126 S.Ct. at 989. Here, Respondents "moved under Rule 50 [(a) and] (b) for judgment as a matter of law and under Rule 59 for a new trial or remittitur" (Pet. App. 6a; 46a), and challenged the sufficiency of evidence on all causes of action on which Petitioners had prevailed at trial. (*See* A2053-2085).[2]

This case was tried on New York state law theories of breach of contract, fraudulent concealment, and tortious interference with contract, and on an allegation of copyright infringement based on a claim that copyright licenses had been obtained by the same alleged fraudulent conduct underlying the substantive fraud cause of action. In reversing the judgment, the Second Circuit relied on well settled principles of New York law that IDJ raised repeatedly throughout the proceedings, including that (1) a tortious interference claim cannot prevail where the defendant is not a stranger to the contract allegedly interfered with; and (2) a fraud claim cannot be premised on an undisclosed intention to breach. (Pet. App. 10a – 15a). Both Petitioners and the District Court – which repeatedly rejected IDJ's arguments

2. Citations to "A" and "SPA" refer respectively to the Appendix and the Special Appendix previously submitted to the United States Court of Appeals for the Second Circuit in this case.

on these points – had full notice of IDJ's arguments. Indeed, the District Court entered an attorneys' fee award against IDJ because of its persistence in "repeating grounds and theories that the Court already had thoroughly dealt with and denied" and in "reiterati[ng] . . . issues and arguments that the Court has consistently rejected" – including the "stranger to the contract" tortious interference argument cited here. (SPA 6 (citing SPA 53)). The petition for certiorari should be denied.

Factual Background

Introduction

This case arises from a contractual dispute between IDJ, a division of UMG Recordings, Inc., and TVT Records, the largest independent recording label in the United States. The dispute involved one central issue: whether IDJ breached an agreement permitting TVT to distribute a record album by an unproven, unknown hip-hop trio called "Cash Money Clique" ("CMC") that had never before released an album. (Pet. App. 2a). The District Court summarized the narrow "quarrel" between the parties as follows:

> At bottom, at issue in this case is a contract dispute and a related copyright infringement claim between two competitors [IDJ and TVT] relating to whether proper consent was secured for the services of two IDJ artists [Ja Rule and Irv Gotti] who previously had produced or recorded for TVT. (SPA 46).

The case involved no personal injury and no harm to the public. (Pet. App. 20a). Nonetheless, after three weeks of

trial – first on liability and then on damages – a jury awarded TVT (and its publishing arm TVT Music, Inc.) an astounding $132 million in tort damages: $25 million in compensatory damages and $107 million in punitive damages. (In contrast, the jury awarded TVT only $126,000 in breach of contract damages.) (Pet. App. 6a; 7a n.2). The jury's shocking verdict stemmed from a series of erroneous legal and evidentiary rulings that transformed this narrow contractual dispute over a never-released album from an unknown group into a tort case that supposedly warranted more than $100 million in punitive damages. The Second Circuit's reversal vindicated consistent arguments throughout the litigation that TVT's tortious interference, fraud and copyright infringement claims were legally baseless.

The Dispute Between the Parties

The dispute between IDJ and TVT is rooted in an earlier relationship between TVT and two hip-hop artists: record producer Irving Lorenzo, known professionally as "Irv Gotti," and hip-hop artist Jeffrey Atkins, known professionally as "Ja Rule." In the early 1990s, Gotti worked for TVT, finding and developing new talent. In 1994, Gotti brought an unknown trio to TVT known as "Cash Money Clique." The members of CMC – including Ja Rule – signed exclusive recording contracts with TVT. CMC recorded a number of songs for TVT but no CMC album was ever released. (Pet. App. 2a; A691-94, A697, A782-83, A788-90).

In 1996, Gotti left TVT and became a talent scout for IDJ, and in 1998 – after TVT's president, Steven Gottlieb, executed a release concerning Ja Rule – Gotti persuaded the artist to record exclusively for IDJ. Although neither Gotti nor Ja Rule had experienced success at TVT, their careers

skyrocketed with IDJ. Gotti produced albums for numerous well-known hip-hop artists that have sold millions of copies, while Ja Rule released three albums that each sold more than a million copies. In 1999, Gotti entered into a 50/50 joint venture with IDJ that did business under the name "Murder, Inc." The joint venture agreement provided that Gotti's talent search and producer services would be exclusive to IDJ and Murder, Inc., and that Ja Rule's recordings would be released under the Murder, Inc. label. (*See* Pet. App. 2a; A696-97, A780-81, A790-92, A801, A927, A2586-87 at ¶¶ 1, 3-4, A2974).

In 2001, TVT moved to capitalize on the popularity Gotti and Ja Rule had achieved with IDJ. A TVT employee approached Gotti – despite Gotti's and Ja Rule's exclusive relationships with IDJ – about finishing the CMC album. TVT's lawyer told Gotti's lawyer that the old CMC songs "weren't particularly good" and "weren't the best representation of Ja Rule's work," but that TVT would nonetheless release them if Gotti and Ja Rule did not "play ball." TVT also threatened to sabotage Ja Rule's next IDJ release – by releasing the old CMC recordings at the same time – if Gotti and Ja Rule did not cooperate. (A697-98, A706-07, A796-98, A1083, A1088, A1236-39, A1243). Lyor Cohen, IDJ's chairman, was upset by TVT's approach to IDJ's exclusive artists and by its threats, and believed that releasing the out-of-date CMC recordings would seriously damage Ja Rule's career and his value to IDJ. (*See* Pet. App. 3a; A637-38, A701, A983, A1086, A1187, A1218, A1240).

Despite Gotti and Ja Rule's exclusive agreements with IDJ and Murder, Inc., Gottlieb induced them to sign a contract for the CMC album, referred to as the "Heads of Agreement" ("HOA"). To motivate Gotti and Ja Rule to pressure IDJ to

consent to this project, the HOA provided that they would receive $200,000 "when [IDJ] signs-off on this Heads of Agreement." (*See* Pet. App. 3a; A858, A863-64, A867-68, A871, A2429 at §§ III(b) and V, A2432, A102 at ¶13).

TVT's approach to Gotti and Ja Rule came at a delicate time for IDJ. Gotti was renegotiating the Murder, Inc. joint venture agreement with IDJ, and through his production company was likewise renegotiating the terms of Ja Rule's future recordings for IDJ. Cohen was very reluctant to tell Gotti that he could not do the CMC project and permitted IDJ to enter into negotiations with TVT regarding the proposed CMC album, even though it was obvious to Gottlieb, Gotti, and Gotti's lawyer that Cohen "hate[d]" the proposed deal. (*See* Pet. App. 3a; A638, A772-73, A799-801, A988, A994-995, A1004, A1086, A1137, A1240).

In the summer of 2001, a TVT lawyer and an IDJ in-house lawyer negotiated a "Side Letter Agreement" ("SLA") that would amend the HOA and authorize Gotti's and Ja Rule's participation in the CMC project. The two lawyers ultimately agreed to a draft that, *inter alia*, amended the HOA's 50/50 profit split (between TVT on the one hand, and Murder, Inc./Gotti/Ja Rule on the other) to a 30/30/40 profit split among IDJ; Murder, Inc./Gotti/Ja Rule; and TVT. While Gottlieb testified that Cohen said "we['ve] got a deal" in a Labor Day weekend telephone conversation, Cohen denied this allegation, and the record is clear that Cohen told his IDJ subordinates that they were not authorized to close the deal. (*See* Pet. App. 4a; A678, A683, A686, A844-45, A892, A998-1001, A1089, A2312).

Gotti did not meet the November 2, 2001 delivery date set forth in the HOA for the CMC album, and informed

Gottlieb in August 2002 that he was pushing back the CMC album until spring 2003. At about this time, Cohen told Gottlieb that IDJ would not agree to the SLA authorizing Gotti and Ja Rule to produce the CMC album. On August 14, 2002, IDJ sent a letter to TVT confirming its rejection of the SLA. TVT filed this lawsuit on August 20, 2002, in the Southern District of New York.

Proceedings in the District Court

TVT's lawsuit alleged that IDJ had (1) committed breach of contract (by breaching the SLA); (2) defrauded TVT by concealing its intention not to perform under the SLA; (3) tortiously interfered with the HOA; and (4) committed copyright infringement through fraudulently procuring copyright licenses from TVT by falsely promising to permit the release of the CMC album. (Pet. App. 5a – 6a). The District Court denied Respondents' motion for summary judgment (*see* Pet. App. 45a), and trial began on March 10, 2003. On the fourth day of trial, well into TVT's case, the District Court – over IDJ's objection – bifurcated the trial into liability and damages phases. (A949-56). On March 17, 2003, Respondents moved for judgment as a matter of law ("JMOL") pursuant to Rule 50(a). (*See* Pet. App. 46a).

Throughout the proceedings in the district court, IDJ argued that if the Court (or jury) found that an oral agreement embodying the SLA had been created, IDJ was necessarily a party to the HOA, because the SLA and HOA constituted a single contract. Consequently, IDJ could not have tortiously interfered with Gotti's and Ja Rule's performance under the HOA. (Pet. App. 8a n.4; 8a – 9a).

On March 21, 2003, the jury found IDJ liable for breach of contract, and Respondents jointly and severally liable for tortious interference, fraudulent concealment, and copyright infringement. (Pet. App. 6a). The District Court refused to allow Respondents to file Rule 50(b) motions challenging these liability determinations. (SPA 190-93). On April 9, 2003, the District Court issued its decision and order denying Respondents' Rule 50(a) motion, addressing at length, and then rejecting, Respondents' "single contract" theory of immunity from tortious interference liability. (Pet. App. 51a – 52a).

After a week-long damages trial two months later, the same jury assessed compensatory and punitive damages against Respondents in an aggregate amount of approximately $132 million. (Pet. App. 6a).

On June 16, 2003, Respondents moved for JMOL under Fed.R.Civ.P. 50(b) on Petitioners' state law and copyright claims, and also moved, in the alternative, for a new trial and/or remittitur pursuant to Fed.R.Civ.P. 59. Respondents again argued that they could not be held liable for tortious interference with the HOA because they were "parties to the contract that was interfered with" insofar as "IDJ was a party to the Side Letter Agreement which was incorporated into the Heads of Agreement." (Pet. App. 93a). The District Court noted that this argument had also been "raised by Defendants in their motion for summary judgment" and rejected at that time. (Pet. App. 93a). The District Court further noted that the "same arguments [were] presented and rejected in [the] context of Defendants' motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) following [the] liability phase" of the trial. (Pet. App. 93a-94a).

On September 2, 2003, the District Court denied IDJ's motions for JMOL and for a new trial, but granted its motion for remittitur, reducing the punitive awards to $25 million for tortious interference, $1 million for fraud, and $125,000 for breach of contract. (Pet. App. 6a; SPA 60). The compensatory awards of $22,358,713 for tortious interference, $1,011,313 for fraud, $150,000 for copyright infringement,[3] and $126,720 for breach of contract, remained undisturbed. (SPA 60). Petitioners accepted the remittitur, and the District Court entered an amended final judgment on October 1, 2003. (SPA 10-12). In an October 22, 2003 decision, the District Court awarded TVT $222,822.53 in attorneys' fees. (SPA 2).

Proceedings in the Second Circuit

IDJ appealed from the liability verdicts on tortious interference, fraudulent concealment, and copyright infringement, as well as the compensatory and punitive damages awards on those claims. IDJ did not appeal from the breach of contract compensatory award of $126,000, but did appeal the punitive award for breach of contract.

The Second Circuit reversed the District Court's judgment, holding "that TVT's claims for tortious interference and for fraudulent concealment fail for lack of a legally sufficient evidentiary basis" and that, as a matter of law, TVT was not entitled to assert a copyright claim, because it had not "rescinded the licenses on which its infringement claim is based." (Pet. App. 7a). Applying settled principles of New York law, the Second Circuit ruled that TVT's tortious

3. The jury originally awarded TVT $411,275 for copyright infringement. TVT subsequently elected to accept the $150,000 statutory damage award. (Pet. App. 6a n.1).

interference claim failed as a matter of law because the "HOA and SLA are one agreement" to which IDJ was a party. Because IDJ was a party to the HOA allegedly interfered with, TVT's tortious interference claim failed as a matter of law and "there was nothing for the jury to decide." (Pet. App. 10a).

The Second Circuit rejected TVT's "perfunctory contention that appellants failed to preserve this argument on appeal." (Pet. App. 8a n.4). The Court referred to TVT's waiver argument as "perfunctory" because this point – which is the basis for this petition for certiorari – was a throwaway argument in a three-sentence footnote. In its entirety, the argument read: "Defendants' argument presumes that they properly preserved their 'same contract' challenge in their 50(a) motion. Defendants did not. (A-1194:14-1195:6). Thus, Defendants waived their 'same contract' argument, too." *See* Brief of Appellees TVT Records and TVT Music, Inc., dated April 16, 2004, at 36 n.14.

The Second Circuit went on to reject TVT's waiver argument because it was clear from the record that "the court and the plaintiffs received multiple notices of, and a full opportunity to meet, the argument" by virtue of Respondents' reiteration of the argument throughout the District Court proceedings, including in their answer to the amended complaint, in their summary judgment motion, in the joint pre-trial order, in their pretrial memorandum, and in their requested jury instructions. (Pet. App. 8a n.4). The Second Circuit noted that Respondents made their "single contract" argument so many times that the District Court not only explicitly rejected it in denying summary judgment, but also "saw fit to dispose of the argument in its denial of the [Respondents'] Rule 50(a) motion." *Id.*

With respect to TVT's fraudulent concealment claim, the Second Circuit held that New York law precluded liability since an alleged "intention to breach does not give rise to a duty to disclose," and thus TVT could not recover tort damages sounding in fraud. (Pet. App. 12a).

The Court likewise rejected TVT's copyright infringement claim, which were based on a theory that certain copyright licenses had been obtained by the same alleged fraud. The Second Circuit did not reach the merits of the copyright claim, however, holding that "the District Court mistakenly concluded that '[a] fraudulently induced copyright license is invalid' *ipso facto*," when in fact "the license must formally be rescinded before an infringement action based on fraudulent inducement of a copyright license can proceed." (Pet. App. 16a). No such rescission had occurred here (and TVT has never contended otherwise). Because TVT had not satisfied a prerequisite for its infringement claim – rescission – the Second Circuit did not reach the question of whether the copyright licenses had been procured by fraud.

On July 12, 2005, TVT petitioned the Second Circuit for rehearing and rehearing en banc. In its petition, TVT complained that "the ground for reversal [of its copyright infringement claim] was raised for the first time in the panel's opinion and, thus, TVT was never afforded an opportunity to be heard." TVT Rehearing Petition at 4. TVT acknowledged in its petition, however, that "'the rule that an order will not be reversed upon a point first raised upon appeal is not absolute.'" *Id.* (quoting *New York, N.H. & H.R. Co. v. Reconstruction Fin. Corp.*, 180 F.2d 241, 244 (2d Cir. 1950)). On December 30, 2005, the Second Circuit denied TVT's rehearing petition. (Pet. App. 159a).

REASONS FOR NOT GRANTING THE PETITION

I. THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED IN THE PETITION

The question presented in TVT's petition is:

> Whether the Second Circuit, in conflict with the law of the First, Third, Fourth and Fifth Circuits, erred by setting aside the jury's verdict and granting judgment as a matter of law, on grounds not preserved in Respondents' motions under Federal Rule of Civil Procedure 50, based on its view that the strictures of Rule 50 do not apply to "questions of law." (Pet. at i).

Even assuming that Petitioners' imagined circuit split exists – which, as discussed below, it does not – the Second Circuit did not decide that question in this proceeding. The Court of Appeals did not determine that IDJ had waived its "single contract" argument nor did it state that "the strictures of Rule 50 do not apply to 'questions of law.'" (Pet. at i). Accordingly, the fundamental premise for the petition is incorrect. For this reason alone, the petition should be denied.

The Second Circuit found that IDJ preserved its "single contract" argument by repeatedly raising it in the District Court proceedings, including: (1) in its answer to the amended complaint; (2) in its summary judgment motion; (3) in the joint pretrial order; (4) in its pretrial memorandum; and (5) by requesting a jury instruction on the issue.

(Pet. App. 8a n.4).[4] Indeed, IDJ reiterated its tortious interference argument so many times that the District Court not only addressed the argument in its denial of IDJ's Rule 50(a) motion (Pet. App. 8a n.4; *see also* SPA 187), but premised its attorneys' fees award on IDJ's insistence on raising the argument throughout the litigation even after the District Court had repeatedly rejected it. (*See* SPA 6 (citing SPA 53)).

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4. The Court stated:

> We find TVT's perfunctory contention that appellants failed to preserve this argument on appeal to be without merit. To the contrary, we are satisfied that they raised it at a number of critical junctures during District Court proceedings. The argument was unambiguously raised in defendants' reply memorandum in further support of their summary judgment motion and in their pre-trial memorandum. They unsuccessfully requested a jury instruction to the effect that they could not be liable for tortious interference if the jury were to find that IDJ was a party to the HOA. The point was also made in their answer to the amended complaint and in the joint pre-trial order. We are not troubled by the fact that the defendants did not reiterate this claim in their Rule 50(a) motion because the court and the plaintiffs received multiple notice of, and a full opportunity to meet, the argument. Significantly, the District Court had already rejected the argument in its opinion denying summary judgment. *See TVT Records v. Island Def Jam Music Group*, 244 F.Supp.2d 263, 275 (S.D.N.Y. 2003). Moreover, we also note that District Court saw fit to dispose of the argument in its denial of the appellants' Rule 50(a) motion. See *TVT Records*, 2003 WL 1858151, at *4 (S.D.N.Y. Apr. 9, 2003). Defendants' obligation was to give clear notice, not to make pests of themselves.

(Pet. App. 8a n.4).

As part of its effort to fabricate a conflict among the circuit courts and a violation of this Court's precedents, TVT mischaracterizes the Second Circuit's decision. According to TVT, "[t]he Second Circuit relied on the[] ["single contract" argument and copyright license rescission] issue[] as grounds for JMOL – though Respondents failed to preserve them – based on an exception for 'legal' issues that contravenes the unambiguous requirements of Rule 50." (Pet. at 11). Petitioners' fictionalized account of the proceedings below is refuted by the Second Circuit's stated reasoning for rejecting TVT's waiver argument, in which it never once invokes TVT's imagined "issue of law" exception to Rule 50.

Moreover, the Second Circuit's determination that IDJ preserved its "single contract" argument by repeatedly raising it throughout the district court proceedings is hardly the "controversial theory" that TVT claims (Pet. at 15), but is entirely consistent with the well-settled rule that:

> [t]he ultimate consideration in determining the sufficiency of a pre-verdict motion is whether it meets the purposes served by the specificity requirement, either in its contents or in the context in which it is made. The purpose of the specificity requirement is twofold: (1) to ensure that the trial court has an adequate basis for a decision on the motion; and (2) to afford the adverse party an opportunity to correct any possible infirmities in the proof presented. Accordingly, if the trial court and the parties actually are aware of the grounds for the motion, strict enforcement of the

> specificity requirement is unnecessary to serve the purposes of Rule 50(a)(2).

Moore's Federal Practice, ¶ 50.21[2] at 50-47 – 50-48 (Matthew Bender 3d ed. 2006). As discussed below, the First, Third, Fourth and Fifth Circuits – which according to TVT more strictly construe Rule 50 – have adopted the interpretation of Rule 50 reflected above. (*See* Section III, *infra*).

TVT also argues that the Second Circuit's ruling rejecting its copyright infringement claim – because of TVT's failure to rescind the copyright licenses it had given to IDJ – also somehow violates Rule 50. (Pet. at 10, 18-19). But this objection has nothing to do with Rule 50. Petitioners' complaint is that the Second Circuit raised the rescission issue *sua sponte*. It is well settled, however, that a Court of Appeals has the discretion to reach an issue for the first time on appeal. (*See* Section II.A., *infra*). And, while the failure of the copyright claim flowed directly from the Second Circuit's rejection of the accompanying fraud claim upon which the infringement claim was premised, the Court of Appeals was permitted under this Court's precedents to rely on a more fundamental flaw in Petitioners' infringement claim – TVT's failure to seek formal rescission of the copyright licenses. (Pet. App. 16a).

II. IT IS WITHIN THE COURT OF APPEALS' DISCRETION TO REACH AN ISSUE FOR THE FIRST TIME ON APPEAL

A. *Singleton v. Wulff* Explicitly Permits a Circuit Court to Reach an Issue for the First Time on Appeal

Contrary to TVT's claim that "[t]his Court has repeatedly held that strict compliance with Rule 50 is a necessary predicate to obtaining appellate review of a jury's verdict" (Pet. at 10), *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), makes clear that no such limitation on the Court of Appeals' jurisdiction exists. In *Singleton*, this Court articulated the rule that:

> [t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where "injustice might otherwise result."

428 U.S. at 120 (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) (citations omitted)). Here, "the proper resolution" of TVT's copyright infringement claim was "beyond any doubt" in light of both the undisputed facts and the Second Circuit's earlier precedents. Significantly, TVT has never denied that – in the words of the Second Circuit – it "neither sued for rescission of the [copyright] licenses nor alleged the breach of any covenant related to their grant." (Pet. App. 16a).

Accordingly, there was nothing unusual or improper in the Second Circuit's exercise of its discretion to reverse the judgment on TVT's copyright infringement claim and correct the District Court's "mistaken[] conclu[sion] that '[a] fraudulently induced copyright license is invalid' *ipso facto*." (Pet. App. 16a).

Rather than discuss *Singleton*, TVT misrepresents *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 218 (1947), and its progeny, including *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 126 S. Ct. 980 (2006), as mandating "that strict compliance with Rule 50 is a necessary predicate to appellate review of a jury's verdict." (Pet. at 14).

Cone and its progeny, however, neither mandate "strict compliance with Rule 50" nor address what questions the circuit courts may resolve for the first time on appeal. Rather, these decisions discuss "the implications of a party's failure to file a postverdict motion under Rule 50(b)" and Rule 59. *Unitherm*, 126 S.Ct. at 985. Thus, *Cone* and *Unitherm* stand for the proposition that "'[i]in the *absence* of such a [Rule 50] motion' an 'appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.'" *Unitherm*, 126 S.Ct. at 986 (quoting *Cone*, 330 U.S. at 218)) (emphasis added). In other words, only when a party completely fails to move for JMOL or a new trial in the district court is the Court of Appeals precluded from granting such relief on appeal.

For example, in *Unitherm*, the appellant, ConAgra, "moved for a directed verdict under Rule 50(a) based on legal insufficiency of the evidence . . . *and neither renewed its*

motion for judgment as a matter of law pursuant to Rule 50(b), nor moved for a new trial . . . pursuant to Rule 59." *Unitherm*, 126 S. Ct. at 984 (emphasis added). This Court held that "since [ConAgra] had failed to renew its preverdict motion as specified in Rule 50(b), there was no basis for review of respondent's sufficiency of the evidence challenge in the Court of Appeals." *Id.* at 989.

In *Cone*, this Court held that the fact that "[r]espondent *did not move for judgment nothwithstanding the verdict* as it might have done under Rule 50(b)," rendered "the appellate court . . . without power to direct the District Court to enter judgment contrary to the one it had permitted to stand." 330 U.S. at 213, 218 (emphasis added). Similarly, in *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952), this Court held that because respondent moved "to set aside the verdict and for a new trial within the time required by Rule 50(b) . . . *[but] failed to comply with permission given by 50(b) to move for judgment n.o.v. after the verdict* . . . respondent is entitled only to a new trial, not to a judgment in its favor." 344 U.S. at 54 (emphasis added). Finally, in *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948), this Court held that "[i]t was error . . . for the Circuit Court of Appeals to direct the District Court to enter judgment for the respondents," when after the petitioner was granted a directed verdict, respondents "moved for a new trial on the ground . . . that there were many contested issues of fact which should have been submitted to the jury . . . *[but] did not move for judgment under Rule 50(b).*" 332 U.S. at 572, 574 (emphasis added).

The proceedings below stand in stark contrast to *Unitherm*, *Cone*, *Johnson*, and *Globe Liquor*, where appellants had failed to make Rule 50(b) motions. Here, there is no dispute that IDJ moved for JMOL pursuant to Rule 50(a), moved for JMOL pursuant to Rule 50(b) after the jury returned its verdict, and also moved for a new trial pursuant to Rule 59. (Pet. App. 6a, 46a). In its Rule 50(b) motion, IDJ attacked the legal sufficiency of each of the claims on which TVT had prevailed at trial, including the tortious interference and copyright claim at issue here. (*See*, *e.g.*, A2053-85). In particular, IDJ repeated the same "single contract" argument on tortious interference that it had raised throughout the district court proceedings and that was ultimately adopted by the Second Circuit. (Pet. App. 93a; *see also* A2063) Therefore, *Unitherm* and *Cone* simply do not apply here.

III. THERE IS NO CIRCUIT CONFLICT

Given that the Second Circuit – in rejecting TVT's waiver claim concerning IDJ's "single contract" argument – never invoked the supposed "issue of law" exception to Rule 50 to which TVT objects, Petitioners' contention that the "First, Third, Fourth and Fifth Circuits have expressly rejected the exception to Rule 50 [for "questions of law"] invoked by the Second Circuit in the decision below" (Pet. at 21), is irrelevant.[5] But even if the Second Circuit had relied upon such an exception, TVT is incorrect that the First, Third, Fourth and Fifth Circuits apply Rule 50 more stringently. In

5. As to the copyright infringement claim, the Second Circuit's only allusion to Rule 50 is the following footnote: "[w]e note that when the trial court denies a Rule 50 motion, both that denial and 'errors of law in the trial court may be raised on appeal.' 9A C. Wright & A. Miller, Federal Practice & Procedure, § 2540, at 373 (1995)." (Pet. App. 15a n.8).

all of these circuits, technical non-compliance with Rule 50 may be excused provided that the movant satisfies the purpose of the rule by asserting its position in a manner that provides the District Court and the opposing party with notice of the alleged deficiency or error and thereby an opportunity to cure it. TVT is equally incorrect in asserting that these circuits forbid appellate consideration of issues not raised in the district court. (*See, e.g.*, Pet. at 12, 21-25).

The First Circuit, for example, has acknowledged that "even in the light of our own stringent adherence to the requirement of a timely formal [Rule 50] motion," an issue may be adequately preserved for appeal where a party makes only "the functional equivalent of a motion for judgment as a matter of law" by, for example, raising the issue during a chambers conference. *Simon v. Navon*, 71 F.3d 9, 14 (1st Cir. 1995).

The First Circuit has also recognized that it "has the power in an exceptional case, to resolve an issue not passed on below." *Mainegeneral Medical Center v. Shalala*, 205 F.3d 493, 500 (1st Cir. 2000) (citation omitted). And, even absent compliance with Rule 50, the First Circuit will still "review simply . . . as to 'whether the record reflects an absolute dearth of evidentiary support for the jury's verdict,' and will reverse the district court if "its ruling is 'obviously insupportable.'" *Davignon v. Clemmy*, 322 F.3d 1, 13 (1st Cir. 2002) (citation omitted). Indeed, even in *Tapalian v. Tusino*, a decision cited by TVT (Pet. at 22), the First Circuit reviewed the movant's waived argument for plain error, notwithstanding his noncompliance with Rule 50. *Id.*, 377 F.3d at 7 n.1 (". . . even if the issue had not been waived . . . we can perceive no plain error").

Similarly, the Third Circuit recognizes a functional equivalent exception to Rule 50, and does not measure the sufficiency of a Rule 50(a) motion by the text alone, but "against the background, as reflected in the record, of what the party now claiming waiver understood as to the tenor of the Rule 50 movant's position and theory. . . . 'The communicative content, "specificity" and notice giving function of an assertion [in a rule 50(a) motion] should be judged in context.'" *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 519 n.18 (3d Cir. 1998); *see also Acosta v. Honda Motor Co., Ltd.*, 717 F.2d 828, 832 (3d Cir. 1983) (defendant's motion for a directed verdict sufficiently specific where, despite "the imprecision of the sentences uttered by defendants' counsel at the time of his Rule 50(a) motion for a directed verdict, plaintiff's counsel and the court understood and responded to defendants' counsel as well as if he had been more specific at the time").

While the Third Circuit "generally refuse[s] to consider issues that are raised for the first time on appeal . . . this in no way undercuts the Supreme Court's teaching" in *Singleton v. Wulff*, (*Roe v. Casey*, 623 F.2d 829, 833 n.11 (1980) (citation omitted)), because "[t]his rule is one of discretion as opposed to jurisdiction." *Kneipp v. Tedder*, 95 F.3d 1199, 1211 n. 25 (3d Cir. 1996). Thus, the Third Circuit has examined the merits of a defense of failure to state a claim upon which relief can be granted that was not raised until after trial, stating that "in unusual circumstances the courts of appeals also have inherent power to reach issues although not timely

raised below." *Weaver v. Bowers*, 657 F.2d 1356, 1361 (3d Cir. 1981), *cert. denied*, 455 U.S. 942 (1982).

The Third Circuit has held that both an objection to or a request for a jury instruction is the functional equivalent of a Rule 50 motion if it is clear that the district court treated it as such. *See, e.g., Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co.*, 89 F.3d 976, 993 (3d Cir. 1996) (citing *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 814-15 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986)). The Third Circuit has also addressed an issue raised for the first time on appeal where plaintiff has failed to raise a waiver objection to the defendants' Rule 50(b) motion before the district court. *See, e.g., Williams v. Runyon*, 130 F.3d 568, 572 (3d Cir. 1997). And, in *Repola v. Morbark Indus. Inc.*, 934 F.2d 483, 488-89 (3d Cir. 1991), the Court held that "when an argument is raised in support of a motion *in limine*, but the court reserves disposition of the motion and never decides it . . . counsel reasonably may conclude that the court has the motion under continuous advisement and that it need not be restated" in a Rule 50(a) motion.

The rule is the same in the Fourth Circuit. In *Singer v. Dungan*, 45 F.3d 823, 828-829 (4th Cir. 1995), for example, the Fourth Circuit excused the movants' failure to "renew their motion at the close of all of the evidence." In doing so, the Court noted that it had in previous cases "reviewed the sufficiency of the evidence, even though the appellant had not properly preserved the sufficiency issue . . . because the record was 'simply not that clear' as to which issues in which motion were actually raised," and had also "held that even though the defendant failed to raise an issue in his Rule 50(a) motion but then raised it in his Rule 50(b) motion, review of this issue was proper because the spirit behind Rule 50 was

served in that the right to jury trial was not jeopardized and the opposing party had notice of the alleged error so as to cure any defect." *Singer*, 45 F.3d at 829 (citing *Miller v. Premier Corp.*, 608 F.2d 973 (4th Cir. 1979); *Federal Savings and Loan Ins. Corp. v. Reeves*, 816 F.2d 130 (4th Cir. 1987)).

The Fourth Circuit likewise recognizes that it "may consider an issue for the first time on appeal 'if the error is "plain" and if [its] refusal to consider such would result in the denial of fundamental justice.'" *Singer*, 45 F.3d at 827 (citation omitted). The Fourth Circuit will also address for the first time on appeal "arguments [that] raise purely legal questions based on facts not in dispute." *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 544 n.*(4th Cir. 2005). *See also Childers v. Chesapeake and Potomac Telephone Co.*, 881 F.2d 1259, 1263 n.1 (4th Cir. 1989) (notwithstanding "general principle that an appellate court should not resolve in the first instance claims that have not been ruled upon by the district court. . . . *all of the questions being passed upon are squarely posed to the court as matters of law from the face of the complaint*") (emphasis added).

Finally, the Fifth Circuit does not "insist[] that parties strictly comply with this [Rule 50] procedural requisite, [but rather] . . . 'approach[es] this requirement with a liberal spirit.'" (*Logan v. Burgers Ozark Country Cured Hams, Inc.*, 263 F.3d 447, 457 (5th Cir. 2001) (citation omitted). Accordingly, the Fifth Circuit has "not required strict

compliance with Rule 50(b) and has excused technical noncompliance where the purposes of the requirement have been satisfied." *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 471 (5th Cir. 1999) (citation omitted). Thus, the Fifth Circuit allows a party to challenge the sufficiency of the evidence even where it has "fail[ed] to comply with the requirements of Rule 50(b), 'when the purposes of the rule have been satisfied because the court has had the opportunity to reconsider sufficiency as a matter of law and because the nonmovant has had the opportunity to cure any insufficiencies.'" *Delano-Pyle v. Victoria County, Tex.*, 302 F.3d 567, 572 (5th Cir. 2002) (quoting *Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950, 956 (5th Cir. 1993)).

Petitioners' reliance on *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994), *Varghese v. Honeywell International Inc.*, 424 F.3d 411 (4th Cir. 2005), and *Johnson v. Sawyer*, 120 F.3d 1307, 1331 (5th Cir. 1997) – cases in which the Fourth and Fifth Circuits refused to review summary judgment decisions after a trial on the merits – is misplaced. (*See* Pet. at 21, 24). The Second Circuit, like the Fourth and Fifth Circuits, has held that "the post-trial appeal of a denial of summary judgment 'will not ordinarily lie' because '[t]he district court's judgment on the verdict after a full trial on the merits . . . supersedes the earlier summary judgment proceedings.'" *Jacques v. Dimarzio, Inc.*, 386 F.3d 192, 199 (2d Cir. 2004) (quoting *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 130 (2d Cir. 1999)). But IDJ's appeal was not based on the denial of its summary judgment motion; IDJ appealed from the denial of its Rule 50 and Rule 59 motions, as the Second Circuit noted. (Pet. App. 6a-7a).

TVT's reliance (Pet. at 22-23) on *Tapalian v. Tusino*, 377 F.3d 1 (1st Cir. 2004); *Hopp v. City of Pittsburgh*, 194 F.3d 434, 440 (3d Cir. 1999), *Bradford-White Corp. v. Ernst & Whinney*, 872 F.2d 1153 (3d Cir.), *cert. denied*, 493 U.S. 993 (1989), and *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984), is equally misplaced, because all of these cases involved a complete failure to raise the relevant issue in the district court. In *Bonjorno*, for example, the Third Circuit explicitly noted that it had "studied the record in great detail at the places noted in Kaiser's brief and we can find nothing that would have put the plaintiffs or the district court on notice" of the waived issue. 752 F.2d at 815. Likewise, in *Hopp*, "the City failed to raise [the waived issue] before the jury returned its verdict." 194 F.3d at 440. In *Bradford-White*, the Third Circuit observed that the appellant "simply did not attempt to establish this affirmative defense before or at trial." 872 F.2d at 1161. Similarly, in *Tapalian*, the appellant never argued that it had raised the issue at any point in the district court. *See Tapalian*, 377 F.3d at 7 n.1. In contrast to *Bonjorno*, *Hopp*, *Bradford-White* and *Tapalian*, Respondents here raised their "single contract" tortious interference argument numerous times throughout the district court proceedings, as the Second Circuit found.

IV. THE SECOND CIRCUIT'S DECISION DOES NOT IMPLICATE THE SEVENTH AMENDMENT

In light of the Courts of Appeals' broad consensus that Rule 50 is to be liberally construed, and this Court's holding that the power to reach an issue for the first time on appeal lies within a circuit court's discretion, TVT's contentions that the Second Circuit's decision in this case improperly "disregards the importance of Rule 50 and its function in safeguarding the Seventh Amendment right to jury trial as

established by *Unitherm* and its predecessors" (Pet. at 16), and "threatens to swallow Rule 50 and erode Seventh Amendment rights" (Pet. at 18-20), is mere hyperbole. It "is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial." *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321 (1967). Furthermore, TVT never explains how its argument that "the *failure to file* a Rule 50(a) motion implicates a party's Seventh Amendment right to trial by jury" (Pet. at 16, citing *Unitherm*) (emphasis added) is remotely relevant here, given that IDJ filed both Rule 50(a) and 50(b) motions, and the District Court explicitly rejected the "single contract" argument in denying both motions.

Although TVT notes that Rule 50 "ensur[es] that an opportunity is given to 'cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment'" (Pet. at 17 (quoting *Amendments to Rules of Civil Procedure for the United States District Courts*, 31 F.R.D. 587, 686 (1963)), TVT fails to explain how that observation bears on this case. The "single contract" argument accepted by the Second Circuit was raised repeatedly by Respondents before the case went to the jury and was ruled on by the District Court. Therefore, TVT had ample opportunity to address this argument and submit any additional relevant evidence.

TVT's argument that "[t]he issues reached by the Second Circuit . . . were inextricably intertwined with the issues put to the jury" regarding its tortious interference claim (Pet. at 17) misses the point. The Second Circuit ruled that the HOA and the SLA constituted a single contract as a matter of law. This issue should never have been put to the jury. As the Second Circuit stated, "there was nothing for the jury to decide." (Pet. App. 10a). In reversing the judgment on the tortious interference claim, the Second Circuit did not, as

TVT suggests, usurp the province of the jury by weighing the evidence. Instead, the Court of Appeals determined that the District Court had erred as a matter of law in submitting the contract interpretation question to the jury, because "[t]he conclusion is inescapable that the SLA and HOA were meant to be read together as a single contract, and therefore IDJ was not a stranger to the agreement." (Pet. App. 11a). As the Second Circuit correctly noted, under New York law "if the documents in question reflect no ambiguity as to whether they should be read as a single contract, the question is a matter of law for the court." (Pet. App. 9a); *see also Int'l Multifoods Corp. v. Comm. Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir. 2002) (interpretation of unambiguous contract is matter of law for the court); *Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 232 F.3d 153, 157-58 (2d Cir. 2000) (same).

The Second Circuit's decision concerning TVT's copyright infringement claim likewise does not implicate the Seventh Amendment. TVT argues that the Second Circuit's reversal of the judgment on copyright infringement was "not a ruling on a 'purely legal' issue divorced from the issues before the jury, but rather a conclusion that the evidence presented to the jury was insufficient because it found no evidence in the record that TVT had rescinded the license." (Pet. at 18). This is nonsense. "Judgment as a matter of law is appropriate when there is an absence of evidence on an issue or claim essential to a nonmoving party's cause of action." *Moore's Federal Practice* §50.05[3] at 50-24 (3d ed. 2006). The reason that the Second Circuit concluded that there was no evidence of rescission in the record is because TVT never sought rescission of the copyright licenses at

issue, a simple fact that TVT has never disputed, either before or after the Second Circuit's decision.[6]

TVT's half-hearted invocation of the Seventh Amendment is a red herring. The Seventh Amendment does not figure in TVT's Question Presented, nor do Petitioners actually contend that their Seventh Amendment rights were violated.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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6. In its Petition for Rehearing and Rehearing En Banc in the Second Circuit, TVT did not dispute that it had failed to seek rescission of the copyright licenses at issue, but rather argued that the Second Circuit had erred in interpreting its own precedents and that the reversal was procedurally improper. *See* Petition of TVT Records and TVT Music, Inc. for Rehearing and Suggestion for Rehearing En Banc, dated July 12, 2005.

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(4)

No. 05-1239

In the Supreme Court of the United States

TVT RECORDS AND TVT MUSIC, INC.,

Petitioners,

v.

THE ISLAND DEF JAM MUSIC GROUP AND LYOR COHEN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF LYOR COHEN IN OPPOSITION TO A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court of appeals lacks power to consider a purely legal ground for judgment that has been presented and rejected at the summary judgment stage, in the party's pretrial memorandum, and in requested jury instructions, and has actually been decided by the district court in passing upon these matters and upon the defendants' Rule 50(a) motion, because the ground was not explicitly stated in the Rule 50(a) motion.

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RESPONDENT LYOR COHEN'S BRIEF IN OPPOSITION

Petitioners have striven mightily to find a question to present that has a patina of certworthiness. But, like Cinderella's stepsisters' attempts to squeeze into the glass slipper, the question they present does not fit their case. The Second Circuit did not grant judgment to respondents on the ground that, as a general matter, purely legal propositions do not need to be included in the Rule 50(a) motion to be available on appeal, but relied instead on the repeated presentation of the argument at various stages of the district court proceedings and, most significantly, the fact that the district court explicitly passed on the argument in its order denying respondent's Rule 50(a) motion. None of petitioners' allegedly conflicting cases present such circumstances.

As for the Second Circuit's reversal on the copyright infringement claim, the court did not even discuss, let alone adopt any rule with precedential force, regarding its power to act on the ground it did; consequently, its action on the point presents nothing to review other than a bare claim of error. Moreover, respondents did specifically contend in the trial court that the licenses were valid; while the Second Circuit employed a different rationale in accepting that claim, such action was well within its discretionary power.

Finally, this Court's recent decision in *Unitherm Food Systems, Inc.* v. *Swift-Eckrich, Inc.*, 126 S.Ct. 980 (2006), has no bearing on this case. *Unitherm* involved a total failure by the appealing party to lodge any *post-verdict* motion under Rule 50(b); it was not about Rule 50(a). Here, it is undisputed that respondents filed comprehensive motions under Rule 50(b).

STATEMENT

This short statement supplements and corrects the statement of the case set forth in the petition.

This case arises from a dispute between two competitors in the music industry regarding the services of hip-hop artist Ja Rule. Petitioner endeavored to turn what was essentially a contract case into a lucrative tort lawsuit. This strategy was successful in the district court, where the jury awarded petitioner $131 million in tort damages, in contrast to its award of just $127,000 in breach-of-contract damages – an award that respondents did not even bother to appeal. (Pet. App. 1a, 7a n.2). At the end of the day, however, the court of appeals found that petitioner's tort theories were legally unsustainable, leaving them only with their modest contract damages.

A. The Parties' Dispute

The case grew out of an alleged agreement (the Side Letter Agreement, or "SLA") under which respondents, Island Def Jam Music Group ("IDJ") and Lyor Cohen (then an executive at IDJ), supposedly agreed to let Ja Rule, a hip-hop artist then under exclusive contract with IDJ, participate in an album that would be produced by petitioners TVT Records and TVT Music, Inc. (collectively, "TVT" or "petitioner"). TVT had earlier entered into an agreement (the Heads of Agreement, or "HOA") with Ja Rule and Irv Gotti, a record producer also under exclusive contract with IDJ, to produce this album.

Eventually, IDJ, through Cohen, refused to permit Ja Rule and Gotti to proceed with the TVT album. While this was clearly a breach of contract if, as the jury ultimately found, the SLA was a valid and binding agreement, TVT was not satisfied with its contract remedies under New York law. It therefore took the position that the contract breach also constituted two separate torts: fraud, on the ground that respondents had entered into the SLA without intending to per-

form it; and tortious interference with contract, on the ground that the refusal to perform the SLA interfered with TVT's rights under the HOA.

B. Proceedings in the District Court

In August 2002, petitioner filed this action alleging breach of contract, tortious interference, fraud, and copyright infringement. In their answer to the amended complaint, respondents raised the defense that they could not be held liable for tortious interference with the HOA because IDJ was effectively a party to that agreement due to the interrelationship between the SLA and the HOA, which could not be implemented without IDJ's consent. (Pet. App. 8a n.4) (A 435, ¶87). (This will be referred to as "the single-contract theory").

When respondents moved for summary judgment, the single-contract theory was one of the asserted grounds. (Pet. Pet. App. 8a n.4; 37a-38a) (A 197). The district court rejected this argument (Pet. App. 38a) and denied the motion for summary judgment (Pet. App. 45a).

Respondents reiterated the single-contract theory in the joint pre-trial order (Pet. App. 8a n.4) (A 457), in their pre-trial briefs (Pet. App. 8a n.4) (A 282) and by requesting a jury instruction embodying the point (Pet. App. 8a n.4).

Trial began on March 10, 2003 and was bifurcated into liability and damages phases. At the close of the evidence on liability, respondents made an oral motion for judgment as a matter of law ("JMOL") pursuant to Rule 50(a). (Pet. App. 46a). In the midst of making the motion, counsel was cut off by the court, which did not wish to hear a reiteration of arguments that it had already considered and ruled upon. (A1190:20-1191:5; A1205:21-1206:3).

On March 21, 2003, the jury returned its verdict (Pet. App. 46a), finding IDJ liable for breach of contract and IDJ and Cohen jointly and severally liable for tortious interfer-

ence, fraudulent concealment, and copyright infringement. (Pet. App. 6a). In its Order of April 8, 2003, the district court denied respondents' Rule 50(a) motion. In doing so, it specifically addressed and rejected the defense that "the Side Letter Agreement and the Heads of Agreement were *** intended by the parties to constitute a single integrated contract *** and, consequently, [that] they cannot be liable for tortiously interfering with a contract to which they are parties." (Pet. App. 51a-52a).

Following the damages phase of the trial, the jury awarded TVT $25 million in compensatory damages, $52 million in punitive damages against IDJ, and $54 million in punitive damages against Cohen. (Pet. App. 1a, 6a; Pet. 8 & n.6). Respondents then moved for JMOL under Fed.R.Civ.P. 50(b) and also moved, in the alternative, for a new trial and/or remittitur pursuant to Fed.R.Civ.P. 59. (Pet. App. 6a, 86a). Respondents again argued that they could not be held liable for tortious interference with the HOA because, *inter alia*, they were "parties to the contract that was interfered with" insofar as "IDJ was a party to the Side Letter Agreement which was incorporated into the Heads of Agreement." (Pet. App. 93a). In denying the Rule 50(b) motion, the district court stated that the "same arguments [had been] presented and rejected in [the] context of Defendants' motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a) following [the] liability phase" of the trial. (Pet. App. 93a-94a).[1]

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[1] Respondents also argued that IDJ was party to the HOA, and therefore not a stranger to the contract that could be sued for tortious interference, by virtue of its 50% stake in the Murder, Inc. joint venture that was TVT's counterparty in the HOA. (Pet. App. 95a-96a). Significantly, and in marked contrast to the single-contract theory, the district court found this claim waived on the ground that respondents had not raised this particular theory of

On September 2, 2003, the district court denied respondents' post-trial motions, except that it remitted the punitive award against Cohen to $3 million and against IDJ to $25 million for tortious interference, $1 million for fraud, and $125,000 for breach of contract. (Pet. App. 6a) (SPA 13, 60). Petitioner accepted the remittiturs. (Pet. 8 n.6).

C. Proceedings in the Second Circuit

Respondents' appeal challenged the liability verdicts on tortious interference, fraudulent concealment, and copyright infringement, as well as the compensatory and punitive damages awards on those claims. IDJ did not appeal from the breach-of-contract compensatory award of $127,000, though it did appeal the punitive award for breach of contract. (Pet. App. 7a n.2). The Second Circuit held that "TVT's claims for tortious interference and for fraudulent concealment fail for lack of a legally sufficient evidentiary basis," and that, as a matter of law, "TVT is not entitled to assert a claim for copyright infringement without having rescinded the licenses on which its infringement claim is based." (Pet. App. 7a). Applying settled principles of New York law, the Second Circuit ruled that TVT's tortious-interference claim was untenable because IDJ was a party to the SLA (as the jury found) and the "SLA and the HOA were a single contract." (Pet. App. 8a). Therefore, IDJ was also a party to the HOA and, as "a party to the HOA *** IDJ could not have tortiously interfered with Gotti's and Ja Rule's performance under the HOA." (Pet. App. 8a-9a).

The Second Circuit rejected TVT's "perfunctory" contention that respondents failed to preserve the single-contract argument for appeal. (Pet. App. 8a n.4). The court deemed TVT's forfeiture argument inadequate because TVT had relegated that issue – now the entire predicate for TVT's certio-

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participation in the HOA in their Rule 50(a) motions. (Pet. App. 95a-96a).

rari petition – to a single, brief footnote. In its entirety, TVT's waiver argument read: "Defendants' argument presumes that they properly preserved their 'same contract' challenge in their 50(a) motion. Defendants did not. (A1194:14-1196:6). Thus, Defendants waived their 'same contract' argument, too." See Brief of Appellees TVT Records and TVT Music, Inc., dated April 16, 2004, at 36 n.14.

The Second Circuit found the issue adequately preserved because it was clear from the record that "the court and the plaintiffs received multiple notices of, and a full opportunity to contest, the argument" by virtue of respondents' reiteration of the single-contract contention in their answer to the amended complaint, in their summary judgment motion, in the joint pre-trial order, and at the charge conference. (Pet. App. 8a n.4). The Second Circuit further observed that, despite TVT's assertions that respondents forfeited the "single-contract" argument by not including it in their Rule 50(a) motion, the district court – intimately familiar with the argument from respondents' repeated presentations of it – nonetheless "saw fit to dispose of the argument in its denial of the [respondents'] Rule 50(a) motion." (Pet. App. 8a n.4). As elaborated above, the district court had explicitly addressed and rejected the "single-contract" argument in its order denying the Rule 50(a) motion. See Pet. App. 51a-52a. In conclusion, the court of appeals opined that respondents were not required to "make pests of themselves" by repeating arguments already made numerous times before.[2]

With respect to respondents' claim that the copyright licenses were not invalid, the court of appeals held that "the District Court mistakenly concluded that '[a] fraudulently

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[2] The district court actually imposed sanctions on respondents for what it viewed as their unnecessary and unwarranted repetition of arguments. See SPA-192; *TVT Records* v. *Island Def Jam Music Group*, 288 F. Supp. 2d 506, 509-510 (S.D.N.Y. 2003) (citing 279 F. Supp. 2d 413, 454 (S.D.N.Y. 2003)).

induced copyright license is invalid' *ipso facto*," when in fact "the license must formally be rescinded before an infringement action based on fraudulent inducement of a copyright license can proceed." (Pet. App. 16a). No such rescission occurred here, a fact that TVT has never contested. This particular ground for rejecting TVT's copyright claim had not been raised by respondents.

DISCUSSION

Petitioner has a serious problem: it has been unable to find a single case in which a court of appeals refused to consider a ground for JMOL that was repeatedly raised by the defendant and repeatedly rejected by the trial court, including an explicit rejection by the trial court in ruling on the defendant's Rule 50(a) motion.

As a result, the conflict that petitioner puts forward as warranting this Court's resolution, dubious on its own terms (see pages 10-11 *infra*), has little or nothing to do with this case, which is therefore a wholly inappropriate vehicle for resolving the issue.

1. Plucking out language from various cases, petitioner contends that a number of circuits refuse to entertain claims for JMOL that have not been raised in a Rule 50(a) motion. A closer examination of these cases causes the claimed conflict, like the Cheshire Cat, to disappear, in this instance even to the grin:

- In *Larch* v. *Mansfield*, 272 F.3d 63, 75-76 (1st Cir. 2001), the defendant failed to respond to plaintiff's request for prejudgment interest. The district court, "having received no opposition" from the defendant (*id.* at 75), granted the request. Not surprisingly, the court of appeals refused to entertain the defendant's belated objection.

- In *Tapalian* v. *Tusino*, 377 F.3d 1, 7 n.1 (1st Cir. 2004), there is no indication in the opinion that the waived issue, the *res judicata* effect of a prior settlement, had been raised at any time prior to appeal.

- The same appears to be true of the statute of limitations claim in *Johnson* v. *Sawyer*, 120 F.3d 1307 (5th Cir. 1997). The court of appeals stated that "[w]e decline to exercise our discretion to address this issue on appeal" (*id.* at 1331), thus demonstrating that it follows no rigid rule barring review in such circumstances.

- In *Varghese* v. *Honeywell Int'l*, 424 F.3d 411, 420-22 (4th Cir. 2005), the defendant raised a preemption argument at the summary judgment stage but appears not to have renewed it thereafter until the appeal. The court refused to entertain the claim, holding that it would not review summary judgment rulings on appeal. The ruling was not predicated upon some supposed ironclad requirement that the issue be specified in the 50(a) motion. *Chesapeake Paper Prods. Co.* v. *Stone & Webster Eng'g Corp.*, 51 F.3d 1229 (4th Cir. 1995), appears to be another instance of a refusal to review the ruling on a summary judgment motion.

- *Black* v. *J.I. Case Co. Inc.*, 22 F.3d 568, 570-71 (5th Cir. 1994), is another exemplar of the proposition that appellate courts will not review summary judgment rulings. The court did review the Rule 50 motions, however, and there is no indication that any issue was deemed waived.

- In *Hopp* v. *City of Pittsburgh*, 194 F.3d 434, 440 (3d Cir. 1999), the opinion does not suggest that

the defendant's claim that it was not subject to a private right of action was ever raised before the Rule 50(b) motion.

- *Bradford-White Corp.* v. *Ernst & Whinney*, 872 F.2d 1153, 1160-61 (3d Cir. 1989), is a case in which the defendant chose for tactical reasons not to present its statute of limitations defense at either the summary judgment or the Rule 50(a) stage. The court of appeals simply affirmed the district court's unsurprising ruling on the Rule 50(b) motion that the issue had been waived.

- Finally, in *Bonjorno* v. *Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 814-15 (3d Cir. 1984), the court of appeals reversed a grant of JMOL on the Rule 50(b) motion based on a claim that had not been raised in the Rule 50(a) motion. The rationale for this decision – that notice of the claim is needed before the conclusion of trial, and that the plaintiff could have reopened its case had it been aware of the defendant's position – obviously has no application here, where the contention had been repeatedly raised by respondents and repeatedly rejected (five times, at least) by the trial court.

Many of these cases involved arguments that appear not to have been raised at all prior to appeal, or at least prior to verdict. Unlike this case, not one of them involved a finding of forfeiture of an argument that had been repeatedly raised and passed upon in the course of the trial court proceedings, let alone one that the district court itself treated as raised and went on actually to address in ruling on the 50(a) motion. Pet. App. 51a-52a; see also Pet. App. 8a n.4.[3]

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[3] Noteworthy in this connection is the district court's subsequent order denying respondents' Rule 50(b) motion. There, the court

Petitioner's insistence that the "single-contract" defense to the tortious interference claim was forfeited also cannot be reconciled with the district court's thorough review of that argument in its Rule 50(a) order. Pet. App. 51a-52a. This fact renders the current case a unique outlier from the typical waiver case. Even if the respondents' failure to repeat the "one-contract" argument yet again in their Rule 50(a) motion would otherwise have worked a forfeiture of the contention, it would make no difference in these unique circumstances because the district court nevertheless expressly considered and ruled upon the argument, thereby mooting the forfeiture objection. See *Meacham* v. *Knolls Atomic Power Lab.*, 381 F.3d 56, 70 (2d Cir. 2004), *vacated on other grounds*, 544 U.S. 957 (2005) ("[Defendant] KAPL's failure to move for JMOL based on the unavailability of an ADEA disparate impact claim constitutes a waiver ***. Nevertheless, the waiver is not an absolute one. Here, the district court considered whether a disparate impact claim was tenable under the ADEA notwithstanding KAPL's failure to raise the issue. The district court's decision allows us to proceed with review. See *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 8 (1991) (considering the merits of an issue where – despite party's failure to present it to the courts below – those courts decided it).").

2. TVT's claim that the conflict it identifies – disconnected though it may be from the instant case – is worthy of review is itself suspect. The insubstantial nature of the conflict is fully elaborated in IDJ's brief in opposition. We add here only that any subtle differences among the circuits in their approach to waiver questions, unlike rules regulating

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confirmed that the defense "that IDJ was a party to the Side Letter Agreement which was incorporated into the Heads of Agreement" was "presented and rejected in [the] context of Defendants' motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a)." (Pet. App. 93a-94a).

parties' primary conduct, is readily tolerable in our national judicial system.

3. Even if the question posed by the petition were actually presented by the decision below and otherwise worthy of this Court's attention, this case would remain a poor vehicle for addressing that question.

First, respondents cannot fairly be faulted for any deficiencies in their Rule 50(a) motion with respect to the single-contract theory because their oral application under Rule 50(a) was cut short by the district court, which expressed impatience with respondents' presentation of arguments that the court deemed repetitious of arguments previously presented and rejected. See A1190:20-1191:5; 1205:21-1206:3. When the respondents took pains to preserve arguments in their Rule 50(b) motion, they were again rebuked by the district court for wasting its time: "[T]he Court does not countenance such piecemeal briefing that is inherently inefficient and disruptive *** " (SPA-192). Indeed, the District Court even ordered respondents to pay TVT's attorneys' fees, based on respondents' persistence in raising arguments that the court had repeatedly rejected. See *TVT Records* v. *Island Def Jam Music Group*, 288 F. Supp. 2d 506, 509-510 (S.D.N.Y. 2003) (citing 279 F. Supp. 2d 413, 454 (S.D.N.Y. 2003)).

Under these circumstances, it would be fundamentally unfair to find forfeiture of an argument of which TVT had prior and repeated actual notice. See, *e.g.*, *Doctor's Assocs., Inc.* v. *Weible*, 92 F.3d 108, 113 (2d Cir. 1996) ("the district court cut short Plaintiffs' argument"); *Wilson Sporting Goods Co.* v. *David Geoffrey & Assocs.*, 904 F.2d 677, 683 (Fed. Cir. 1990) (rejecting appellee's argument that appellant had failed to meet Rule 50's specificity requirement because "the court cut short counsel's statement"); *Lamborn* v. *Dittmer*, 688 F. Supp. 113, 115 (S.D.N.Y. 1988) (because court indicated that making the motion would be "a waste of time" and that little time would be allowed for argument, "the court has

to bear much of the responsibility for counsel's silence. It would not be fair now to deny the motion on procedural grounds"), *rev'd on other grounds*, 873 F.2d 522 (2d Cir. 1989).

Second, as the court of appeals itself noted, TVT's contention that respondents failed to preserve their arguments under Rule 50 was, to put it mildly, "perfunctory." (Pet. App. 8a n.4). In fact, it was so perfunctory that TVT devoted only a single, short footnote to the question that is now the core of its certiorari petition. See page 6, *supra*. In contrast to respondents' supposed waiver, which, if anything, was a mere failure to reiterate the objection at the proper time, petitioners failed to develop their argument at all. Such a lackadaisical presentation by TVT was insufficient to present the issue on appeal. "A contention is not sufficiently presented for appeal if it is conclusorily asserted only in a footnote." *Tolbert* v. *Queens College*, 242 F.3d 58, 75 (2d Cir. 2001). See *also LaFevers* v. *Gibson*, 182 F.3d 705, 725 (10th Cir. 1999) ("We have repeatedly warned litigants that issues adverted to in a perfunctory manner and without developed argumentation are deemed waived on appeal."); *Norton* v. *Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."). Therefore, TVT's Rule 50 argument was not properly presented even in the court below. This is not an auspicious circumstance for plenary consideration by this Court.

Third, and finally, even if there were a circuit conflict justifying guidance from this Court as to the application of Rule 50(a), granting review of a case from the Second Circuit's side of the supposed split would pose acute problems of unfairness arising from retroactive application of a new rule of law. Respondents here were entitled to rely on Second Circuit precedent governing what is necessary to preserve an argument for appeal. Announcing a new rule in this case would penalize them unfairly. Consequently, if the

Court wishes to address the supposed circuit conflict, a case drawn from the other side of the split (the side requiring more explicit, specific, and rigorous preservation of arguments) would be a more appropriate vehicle.

4. TVT objects that the Second Circuit's ruling rejecting TVT's copyright infringement claim on the basis of its failure to rescind the copyright licenses it had given to IDJ also somehow transgresses Rule 50. Pet. 10, 18-19. Again, this issue is thoroughly addressed in IDJ's response. We add only two observations. First, as petitioner expressly concedes, respondents in fact "argued that they had valid licenses." (Pet. 7). Thus respondents raised and preserved the *issue*. While they did not press precisely the same *argument* on that issue as that on which the court of appeals relied, it does not violate any waiver principles to accept on appeal arguments or theories on an issue that differ from those made at the trial court. See *Ford* v. *Bernard Fineson Dev. Ctr.*, 81 F.3d 304, 307 (2d Cir. 1996) (issue is properly preserved where, at worst, party "proffer[s] a new legal argument that concerns an issue already considered at some length by the district court"); *cf. Pamida, Inc.* v. *E.S. Originals, Inc.*, 281 F.3d 726, 731 n.4 (8th Cir. 2002) (appeals court may affirm ruling regardless of whether lower court's reasoning was correct).

Second, the court of appeals' opinion contains no discussion of the waiver question petitioner seeks to raise and sets no precedent on the subject. Even assuming petitioner's objection to the copyright ruling were well founded, therefore, it amounts to nothing more than a request for correction of a non-precedential error. It is therefore a highly unsuitable candidate for this Court's review.

5. Finally, TVT contends that review – indeed, summary vacatur – of the judgment below is appropriate on the basis of this Court's recent decision in *Unitherm Food Systems, Inc.* v. *Swift-Eckrich, Inc.*, 126 S. Ct. 980 (2006). See Pet. 11, 14, 27-28. This contention is baffling, as *Unitherm* did

not involve the application of Rule 50(a). Rather, it involved "the implications of a party's *failure to file a postverdict motion under Rule 50(b)*" or Rule 59. *Unitherm*, 126 S. Ct. at 985 (emphasis added). In the instant case, there was a thorough Rule 50(b) motion filed. Therefore, *Unitherm* is wholly inapposite.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-1239

In the Supreme Court of the United States

TVT RECORDS AND TVT MUSIC, INC.,
PETITIONERS,

v.

THE ISLAND DEF JAM MUSIC GROUP AND LYOR COHEN,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ARGUMENT

Respondents mischaracterize the record and the law, but cannot dispute that the Second Circuit granted JMOL on two grounds never articulated in any Rule 50(a) motion. The Second Circuit's express justification for excusing this waiver was its view that both issues were questions "of law." Pet. App. 9a, 15a n.8. The First, Third, Fourth and Fifth Circuits would not have set aside the jury's verdicts because those circuits, unlike the Second, do not grant JMOL on issues "of law" not raised in pre-verdict motions. Respondents cite many cases from the circuits in which TVT would have prevailed, but none actually excuses noncompliance with Rule 50(a) as Respondents contend. In fact, none of Respondents' cases even implicates the significant circuit split presented here: Many do not involve jury trials or Rule 50; in others, the court found that there was a Rule 50(a) motion or its "functional equivalent" presenting the issue, unlike here; and the rest were decided under a plain error standard, which was not applied and could not have been satisfied here. The Petition thus squarely presents a significant circuit split warranting *certiorari*.

At a minimum, the Court should grant, vacate and remand in light of *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 126 S. Ct. 980 (2006). Respondents would limit *Unitherm's* reach to cases in which no Rule 50(b) motion was made. Their narrow reading, however, completely ignores this Court's explicit holding that JMOL may only be granted "on grounds advanced in the pre-verdict motion." *Id.* at 984 n.1. That holding requires reversal of the decision below.

I. THE ISSUE RAISED IN THE PETITION IS SQUARELY PRESENTED

Respondents do not contest that the Second Circuit *expressly* held that they did not file a Rule 50(a) motion raising the "single contract" issue, but excused this waiver, stating: "We are not troubled by the fact that the defendants did not reiterate [the "single contract"] claim in

their Rule 50(a) motion...." Pet. App. 8a n.4. Nor do they dispute that the Second Circuit acknowledged reversing the copyright verdict on a basis that Respondents did not urge on appeal, much less at the 50(a) stage. *See id.* at 16a (reversing copyright verdict "but not for the reason advanced by [Respondents]"); Cohen Opp. at 7 (conceding that Respondents did not raise "[t]his particular ground").

Instead, Respondents erroneously claim that this case does not raise the question presented because the Second Circuit "never invoked the supposed 'issue of law' exception to Rule 50 to which TVT objects...." IDJ Opp. at 20. The sole justification for the Second Circuit's decision to set aside two jury verdicts and grant JMOL on bases never raised in a Rule 50(a) motion was that it deemed both issues questions "of law." Pet. App. 9a ("[I]f the documents in question reflect no ambiguity as to whether they should be read as a single contract, the question is a matter of law for the court."); *id.* at 8a n.4 (emphasizing Respondents' arguments on "single contract" in summary judgment reply to excuse failure to comply with Rule 50(a)); *id.* at 15a n.8 ("We note that when the trial court denies a Rule 50 motion, both that denial and 'errors of law in the trial court may be raised on appeal.'" (citation omitted)).

In addition, Respondents contend that the District Court denied them an opportunity at Rule 50(a) to raise the issues the Second Circuit decided; and that TVT was not prejudiced by their failure to comply with the Rule. IDJ Opp. at 27; Cohen Opp. at 11. Even if true, these arguments would not be relevant because this case squarely presents an acknowledged failure to comply with Rule 50(a); in any event, the record flatly contradicts Respondents' claims.

First, Cohen's assertion that the District Court "cut short" counsel's oral Rule 50(a) motion and prevented Respondents from complying with the Rule, Cohen Opp. at 11, is simply not true. The transcript shows that counsel consumed eleven transcript pages with unfettered argument, yet never mentioned the "single contract" or rescission issues. Petitioners' Reply Appendix ("Reply

App.") 12a-19a. As the District Court itself has explained, the only point at which it understandably limited Respondents' argument was after TVT had responded: "[T]he Court never 'truncated' Defendants' counsel's presentation in support of their motion under Rule 50(a). Rather, the Court ended counsel's *reply* presentation" to avoid repetition. Pet. App. 96a n.7; *see* Reply App. 24a.

Second, IDJ's claim that the District Court "premised its attorneys' fees award on Respondents' insistence on raising the ["single contract"] argument throughout the litigation even after the District Court had repeatedly rejected it," and that this somehow excused Respondents' failure to present this argument in its Rule 50(a) motion, IDJ Opp. at 4, 14, is equally meritless. The District Court did observe in its fees opinion that Respondents engaged in unnecessarily aggressive litigation tactics, such as IDJ's "purported [ ] cancel[ation] of their earlier repudiation of their contract with TVT, the very agreement that, coming into the trial, they had vehemently denied ever existed, thereby causing a bifurcation of the trial and prolonging final resolution of the merits of the case." Special Apx. 53. However, the District Court actually denied the vast majority of the fees requested by TVT. Reply App. 8a-9a. The only fees the trial court granted were those incurred by TVT after the jury verdict was returned – a "penalty" that could not have dissuaded IDJ from filing a *pre-verdict* motion. *Id.*[1]

Third, there is no merit to Respondents' contention that their failure to raise the "single contract" defense in their pre-verdict motion was somehow cured by the District Court's decision to address the issue in its Rule 50(a) ruling. IDJ Opp. at 27; Cohen Opp. at 11. The District Court's Rule 50(a) decision was not issued until three weeks *after* the jury

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[1] IDJ's contention that the District Court prevented it from filing its Rule 50(b) motion, IDJ Opp. at 9, has no bearing on its failure to raise the relevant arguments pre-verdict. Moreover, the District Court refused the motion because "no judgment has been entered, and the jury has yet to make its determination on damages." *Id.* After judgment was entered, Respondents were permitted to file Rule 50(b) motions.

returned its verdict on liability. Special Apx. 114 (jury charged on March 19 and returned verdict on March 21); *id.* at 183 (District Court issued Rule 50(a) decision on April 9). Thus, it could not have cured the Seventh Amendment problem that Respondents created when they elected not to raise this defense at the Rule 50(a) stage. And Respondents ignore that TVT never had any notice of the rescission theory that the Second Circuit raised *sua sponte*.

Finally, TVT did not waive the argument that Respondents did not file a Rule 50(a) motion preserving the relevant defenses, and the Second Circuit did not hold that it did. Instead, the Second Circuit addressed TVT's waiver argument on the merits. Pet. App. 8a n.4. This is not surprising because four pages of TVT's appellate brief were devoted to various waiver arguments. These included discussion of IDJ's attempt to insert its newly minted "same entity" argument, and that "Defendants' argument presumes that they properly preserved their 'same contract' challenge in their 50(a) motion. Defendants did not. (A-1194:14-119:6.) Thus, Defendants waived their 'same contract' argument, too." Brief of Appellees at 34-37 & n.14. TVT surely was not required to reiterate the legal support and reasoning it had already presented in the context of the "same entity" argument.[2]

II. THE SECOND CIRCUIT'S RULING CONFLICTS WITH THE LAW OF THE FIRST, THIRD, FOURTH AND FIFTH CIRCUITS

As discussed above, the Second Circuit's decision is a purported application of its rule permitting "correct[ion of] an error below despite the lack of a timely request in the district court [pursuant to Rule 50] if the issue is purely legal and no fact finding is required." *Meacham v. Knolls*

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[2] Moreover, this Court has not hesitated, in the face of similar arguments, to summarily vacate and remand for reconsideration in light of *Unitherm*. *See Vazquez-Valentin v. Santiago-Diaz*, 126 S. Ct. 1329 (2006) (vacating *Vazquez-Valentin*, 385 F.3d 23, 29 n.8 (1st Cir. 2004), in which court found that appellee waived her Rule 50 waiver argument).

Atomic Power Lab., 381 F.3d 56, 69 (2d Cir. 2004), *vacated on other grounds*, 544 U.S. 957 (2005); *see* Petition at 16 (discussing earlier Second Circuit cases applying this alleged exception to Rule 50).

The Second Circuit's exception to Rule 50 authorizing review of waived issues "of law," which has also been adopted by the Sixth, Ninth, Tenth and Federal Circuits, Petition at 25-27, directly conflicts with the law of the First, Third, Fourth and Fifth Circuits. *See* Petition at 21-25.[3] Respondents' argument that these cases do not mean what they say, and that these circuits actually do review issues not preserved in Rule 50(a) motions on a discretionary basis, IDJ Opp. at 21-26, is wrong. Many of the cases they cite do not even involve jury trials, much less Rule 50, and the Seventh Amendment concerns they implicate.[4]

The cases Respondents cite that actually involve Rule 50, moreover, are all fully consistent with TVT's position that it would have prevailed in the First, Third, Fourth and Fifth Circuits, which would not have addressed the issues the Second Circuit relied on to set aside the jury's verdict. For example, Respondents cite a number of cases where the court reviewed an issue because it concluded that the appellant *had* properly preserved it through a Rule 50(a)

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[3] IDJ's contention that *Tapalian v. Tusino*, 377 F.3d 1 (1st Cir. 2004) (cited in the Petition at 22), is not in conflict with the Second Circuit's decision is baseless. The First Circuit expressly held: "As Tusino failed to raise this argument in his Rule 50(a) motion at the close of the evidence, it is deemed waived on appeal." *Id.* at 7 n.1. Although the court went on briefly to discuss the merits of the underlying claim, it prefaced its remarks with "even if the issue had not been waived ..." and rejected the waived argument. *Id.*

[4] *See Hill v. PeopleSoft USA, Inc.*, 412 F.3d 540, 542-43 (4th Cir. 2005) (appeal from denial of motion to compel arbitration); *Maine General Med. Ctr. v. Shalala*, 205 F.3d 493, 500 (1st Cir. 2000) (appeal from summary judgment ruling); *Kneipp v. Tedder*, 95 F.3d 1199, 1211 n.25 (3d Cir. 1996) (appeal from grant of summary judgment); *Childers v. Chesapeake & Potomac Tel. Co.*, 881 F.2d 1259, 1263 n.1 (4th Cir. 1989) (appeal from order removing case to federal court); *Weaver v. Bowers*, 657 F.2d 1356, 1362 (3d Cir. 1981) (reaching issue after bench trial in highly "unusual circumstances").

motion or its "functional equivalent." *Simon v. Navon*, 71 F.3d 9, 14 (1st Cir. 1995) (deciding issue preserved by oral Rule 50(a) motion made in chambers); *see Logan v. Burgers Ozark Country Cured Hams Inc.*, 263 F.3d 447, 457 (5th Cir. 2001) (finding that appellant "adequately preserved the [relevant] issue"); *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 474 (5th Cir. 2000) (rejecting waiver claims because grounds asserted in pre-verdict motion were "sufficiently similar" to post-trial motion); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 519 n.18 (3d Cir. 1998) (finding defendant's Rule 50(a) motion sufficient to preserve contested issue because "party now claiming waiver understood ... tenor of the Rule 50 movant's position and theory"); *Repola v. Morbark Indus., Inc.*, 934 F.2d 483, 485, 488 (3d Cir. 1991) (reviewing issue raised in motion *in limine* never decided by the district court and remanding for new trial but refusing to grant JMOL); *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 814-15 (3d Cir. 1984) ("jury instructions may suffice to fulfill the requirement that a motion for a directed verdict be made before granting a JNOV *only if it is clear that the district court treated the request as a motion for a directed verdict and ruled on it as such*") (emphasis added); *Acosta v. Honda Motor Co.*, 717 F.2d 828, 832 (3d Cir. 1983) (finding motion "sufficiently specific to satisfy Rule 50"); *Miller v. Premier Corp.*, 608 F.2d 973, 979 n.3 (4th Cir. 1979) (holding issue preserved in "[o]ral motions for 'dismissal'").[5]

Here, the Second Circuit concluded that Respondents never argued the "single contract" or rescission theories on

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[5] Respondents cite one 19-year old case in which the Fourth Circuit decided an unpreserved legal issue where it found that appellant's waiver "did not prejudice" the other side. *Fed. Sav. & Loan Ins. Corp. v. Reeves*, 816 F.2d 130, 138 (4th Cir. 1987). That case, however, is not good law in the Fourth Circuit after its more recent decisions, including *Chesapeake Paper Products Co. v. Stone & Webstern Engineering Corp.*, 51 F.3d 1229 (4th Cir. 1995), and *Varghese v. Honeywell International Inc.*, 424 F.2d 411, 422-23 (4th Cir. 2005), which expressly acknowledged the circuit split on the question presented in the Petition.

Rule 50(a). The court below granted JMOL on these issues because it viewed them as legal questions. The circuits on the other side of the split would not have done so. *See, e.g., Varghese*, 424 F.3d at 422 (reaffirming prior case law expressly "reject[ing] the 'contention that our review should depend on whether the party claims an error of law or an error of fact'"). Indeed, many of Respondents' own cases refuse to grant plenary review because the appellant did not comply with Rule 50. *See, e.g., Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 89 F.3d 976, 993 (3d Cir. 1996) ("'It is clear under our jurisprudence that this court cannot reverse the district court's decision denying [a] Rule 50(b) motion for j.n.o.v. on the basis of an argument the [a party] failed to raise in support of its predicate Rule 50(a) motion for a directed verdict.'") (citations omitted); *Bonjorno*, 752 F.2d at 815 (same).

Respondents also rely on a few cases in which the First, Fourth and Fifth Circuits reviewed arguments that were not preserved in Rule 50(a) motions under the plain error standard. For example, in *Singer v. Dungan*, 45 F.3d 823, 828 (4th Cir. 1995), the defendant neglected to file a Rule 50(a) motion, but the Court of Appeals held that "even in the wake of a complete failure to move for judgment as a matter of law, if plain error would result, appellate review is permissible." *See also Davignon v. Clemmey*, 322 F.3d 1, 13 (1st Cir. 2003) (reviewing "whether the record reflect[ed] an absolute dearth of evidentiary support for the jury's verdict" where appellant failed to comply with Rule 50) (quotation marks omitted); *Delano-Pyle v. Victoria County, Texas*, 302 F.3d 567, 573 (5th Cir. 2002) (same).

This plain error exception to the requirements of strict compliance with Rule 50 – which probably does not survive *Unitherm*[6] – does not apply here. The Second Circuit did

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[6] *Unitherm* held the lower courts "powerless" to provide relief not requested pre-verdict and renewed in a post-verdict motion. 126 S. Ct. at 985-86, 88. This Court has thus granted, vacated and remanded in light of *Unitherm* a decision reviewing an argument waived on Rule 50 for plain error. *See* 126 S. Ct. 1329 (remanding *Vazquez-Valentin*, 385 F.3d at 29

not invoke a plain error exception, but instead engaged in plenary review, and Respondents could not demonstrate plain error even if such review were permissible under *Unitherm*. *See United States v. Olano*, 507 U.S. 725, 734 (1993) (reversal under plain error standard requires showing that there is an error that is "clear" or "obvious" and "affects substantial rights"). The evidence showed that the Side Letter Agreement and Heads of Agreement were not intended to constitute a single integrated contract: they were negotiated separately; neither states any intention to form a single contract; and the Heads of Agreement includes terms enforceable between the individual artists and TVT alone. Pet. App. 37a; *id.* at 51a-52a. Accordingly, there is no basis for disturbing the jury's verdict on tortious interference based on Respondents' "single contract" theory.[7] The copyright verdict also could not have been reversed as plain error. The alleged error was not apparent to anyone, even Respondents; it was so obscure the Circuit had to raise it *sua sponte*. Nor was it error; the license was not supported by consideration and was thus revocable at will. *See* Petition at 18.[8]

III. THE SECOND CIRCUIT'S DECISION FLATLY CONTRAVENES RULE 50 AND THIS COURT'S DECISION IN *UNITHERM*

Rule 50(a)(2) requires that a motion for JMOL "shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Thus,

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n.8, which assessed sufficiency of the evidence based on purported authority to "'inquire whether the record reflects an absolute dearth of evidentiary support for the jury's verdict'") (citation omitted).

[7] Even though Respondents did not argue the "single contract" theory at trial, the record shows that the jury rejected it. *See* Petition at 17-18 (discussing instruction requiring jury to find for IDJ on tortious interference if it found that IDJ was a party to the Heads of Agreement).

[8] IDJ's reliance on *Williams v. Runyon*, 130 F.3d 568, 572 (3d Cir. 1997), is also misplaced. The court there unremarkably held that the Court of Appeals may address an issue if the appellee waived its objection to the appellant's failure to comply with Rule 50.

IDJ's assertion that a party may generically request JMOL with respect to each claim, IDJ Opp. at 20, is flat wrong. Rule 50(b) also describes the post-verdict motion as a renewal of the pre-verdict motion; accordingly, a Rule 50(b) motion may only include grounds asserted in a Rule 50(a) motion. Respondents cannot evade Rule 50(a) by pointing to their Rule 50(b) motion because they were not entitled to rely in their Rule 50(b) motion on any theory omitted from their Rule 50(a) motion.

Respondents' interpretation of this Court's Rule 50 cases would render them toothless. IDJ claims that "*Unitherm* has no applicability here, because in that case *the respondent filed no post-verdict motions as to liability whatsoever*," IDJ Opp. at 3, but simply ignores that the Court expressly held that "[a] post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion." 126 S. Ct. at 984 n.1. Likewise, Respondents make no effort to address the *Unitherm* Court's statement that it was rejecting the dissent's theory because that theory would allow the Courts of Appeals to "examine the sufficiency of the evidence regardless of whether the appellant had filed a Rule 50(a) motion in the district court...." *Id.* at 986 n.4.

Nothing in the cases from this Court cited by Respondents undermines this holding of *Unitherm*. The prior Rule 50 cases did focus principally on Rule 50(b), but also emphasized that Rule 50 must be strictly observed. *See Johnson v. N.Y., New Haven, & Hartford R.R. Co.*, 344 U.S. 48, 52 (1952) ("Rule 50(b) was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgments notwithstanding verdicts."); *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 572 (1948) (requiring defendant to renew under Rule 50(b) even though verdict was directed pursuant to plaintiff's Rule 50(a) motion); *Cone v. W.Va. Pulp & Paper Co.*, 330 U.S. 212, 217-18 (1947) (holding that Rule 50 must be strictly enforced because it protects Seventh Amendment right to trial by jury).

Moreover, *Singleton v. Wulff*, 428 U.S. 106 (1976) – which IDJ contends "makes clear that" strict compliance with Rule 50 is not necessary, IDJ Opp. at 17 – did not involve either a jury trial or Rule 50. Respondents also neglect to mention that in *Singleton* this Court actually reversed because it did "not agree ... with the action of the Court of Appeals in proceeding beyond the issue of standing to a resolution of the merits of the case." *Singleton*, 428 U.S. at 119. It is thus most often cited not for Respondents' claimed rule excepting waiver, but rather for the contrary proposition that the Courts of Appeals should *not* decide issues, like those relied upon here by the Second Circuit, which were not properly presented below.

CONCLUSION

For the reasons set forth above and in the Petition, *certiorari* should be granted and the decision below reversed.[9] Alternatively, the Court should grant the petition, summarily vacate the decision below, and remand it to the Second Circuit with instructions to reconsider its decision in light of *Unitherm*.

Respectfully submitted,

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[9] Cohen's argument that review "would pose acute problems of unfairness arising from retroactive application of a new rule of law," Cohen Opp. at 12, is inconsistent with *Unitherm* itself, which reversed a decision applying settled Tenth Circuit law excusing noncompliance with Rule 50. 126 S. Ct. at 984.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TVT RECORDS and TVT MUSIC, INC.,
Plaintiffs,

v.

THE ISLAND DEF JAM MUSIC GROUP
and LYOR COHEN,
Defendants.

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02 Civ. 6644 (VM)

October 22, 2003

DECISION AND ORDER

Opinion by VICTOR MARRERO, United States District Judge.

Following a bifurcated trial of this action, the jury rendered verdicts of liability and awarded substantial damages in favor of plaintiffs TVT Records and TVT Music, Inc. (collectively "TVT") and against defendant The Island Def Jam Music Group ("IDJ") on TVT's claim of breach of contract, and against IDJ and defendant Lyor Cohen, IDJ's Chairman ("Cohen" and, collectively with IDJ, "Defendants") jointly and severally on TVT's claims of willful copyright infringement, fraud by fraudulent concealment and tortious interference with contractual relations. By Decision and Order dated September 2, 2003, the Court denied Defendants' post-trial motions pursuant to Federal Rule of Civil Proce-

dure 50(b) for a judgment as a matter of law.[1] By a separate Decision and Order issued the same day, the Court granted Defendants' motions pursuant to Rule 59 for a new trial and/or remittitur of the punitive damages award.[2] The Court reserved decision on TVT's motion pursuant to Section 505 of the Copyright Act, *17 U.S.C. § 505*,[3] requesting an amount of, at minimum, $ 2,192,863.20 in attorneys fees and $ 567,460.42 in expenses.[4] TVT subsequently supplemented its motion to include TVT's additional attorneys' fees and expenses totaling $ 494,474.35 that it ascribes to post-trial proceedings in this action. (See Supplemental Declaration of Pamela L. Gurley in Further Support of Plaintiffs' Motion for Attorneys' Fees, dated September 16, 2003, at 2.)

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[1] The Decision and Order concerning the Rule 50(b) motion is reported as *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 366, (S.D.N.Y. 2003)

[2] The Decision and Order concerning the Rule 59 motion (the "Remittitur Decision") is reported as *TVT Records v. The Island Def Jam Music Group*, 279 F. Supp. 2d 413, (S.D.N.Y. 2003).

[3] Section 505 of the Copyright Act provides in pertinent part: "In any civil action under this title, the court in its discretion may . . . award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505.

[4] These figures are based on TVT's claimed litigation fees and costs amounting to approximately $ 3.5 million, with 80 percent of that total apportioned to obligations TVT purportedly incurred to advance the prosecution of its copyright infringement claim. (*See* TVT's Memorandum of Law in Support of Its Motion For Attorneys' Fees, dated June 16, 2003, at 1.) TVT also requested an upward adjustment of the attorneys' fees award based on the difficulty of the litigation, in accordance with the factors articulated in *United States Football League v. National Football League*, 887 F.2d 408, 413 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071, 110 S. Ct. 1116, 107 L. Ed. 2d 1022 (1990). (*See id.*) Alternatively, TVT seeks adjustment of the award to a higher amount in the exercise of the Court's inherent power or under 28 U.S.C. § 1927 to reflect Defendants' alleged vexatious litigation. (*See id.*)

In the Remittitur Decision, the Court observed that among the functions of punitive damages, the remedy offers a law enforcement "bounty", serving to create an incentive for plaintiffs injured by extreme misconduct to undertake the risks and burdens of litigation to redress the wrongs. *See TVT*, 279 F. Supp. 2d 413, 425-26 (citing cases). This role is manifested in rules permitting juries to hear evidence of, and to take into account in assessing punitive awards, the extent of attorneys' fees and other litigation costs plaintiffs are forced to incur in order to prosecute defendants' egregious offenses. See id. (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), and *Softel, Inc. v. Dragon Med. and Scientific Comm. Ltd.*, 891 F. Supp. 935, 945-46 (S.D.N.Y. 1995)). Implicitly, allowing the jury to weigh such evidence assumes that any penalty assessed may incorporate consideration of plaintiff's attorneys' fees and costs as an element of the recovery it awards. See *Jeffries Avlon, Inc. v. Gallagher*, 149 Misc. 2d 552, 567 N.Y.S.2d 339, 339-40 (N.Y. Supp. 1991) (noting that although legal fees are generally not recoverable, an exception has been carved in some jurisdictions, including New York, "permitting evidence of attorneys' fees to be considered by the fact-finder in determining an award of exemplary or punitive damages in cases where malice has been proved. . . .")

In practice, enabling plaintiffs to offer evidence of litigation costs may serve a dual purpose. The magnitude of the financial burdens the litigation imposes upon the plaintiff may provide to the factfinder instructive circumstantial insight into the full scope of the misconduct and the resources required to bring it to light, as well as some glimpse into the state of mind of the offender concerning issues such as willfulness, bad faith, and other indeces of reprehensibility. Allowing the jury to consider the plaintiff's outlays as a factor in its assessment of punitive relief could also inform the jury's calculation of the penalty fitting for the particular of-

fender and the offense, that is, the damages that would sufficiently punish and deter the wrongdoer's extreme malfeasance by rendering it unprofitable to engage in such misconduct and alerting the defendant of the whole range of the underlying risks entailed, including the prospect of being tacitly taxed in a punitive award for the litigation costs the plaintiff was compelled to expend to prosecute the action.

The Court pointed out, however, that this law enforcement purpose could be problematic in some circumstances, specifically "where the litigation involves multiple claims arising out of the same core event, some based on common law and some on statutory actions that authorize recovery of attorney's fees and costs." *Id.* at n.17. This concern, as the Court noted, derives from the potential for duplicative recovery that may occur in the event a common law punitive damages award includes an amount that encompasses and rewards as an unspecified component of harms suffered, the plaintiff's undifferentiated expenses incurred in prosecuting the entire action, and the plaintiff later separately seeks reimbursement of attorney's fees and costs, especially when such recovery is authorized by an applicable statute. *See id.*

The circumstances described above prevail in this case. The Court, recognizing the unique and extensive burdens that Defendants' intense, at times even excessive, litigation strategies had imposed on TVT, allowed the jury to hear and take into account in assessing punitive damages, evidence of TVT's outlays for attorneys' fees and costs, at that time an amount of approximately $ 3 million. *See id.* at 453-55. TVT prevailed under both its common law and federal copyright infringement claims. The damages assessed in respect of the various claims, however, are lopsided. While the combined awards as regards the common law causes of action totaled $ 23,496,746 in compensatory and $ 108,000,000 in punitive damages, those pertaining to copyright in-

fringement amounted to only $411,275 for compensatory and $300,000 for punitive relief.[5] Thus, while TVT contends that the bulk of its litigation expenses related to pursuing the copyright claims -- by TVT's computation at least 80 percent of its fees and costs -- the reality appears otherwise. The federal claims represent but a fraction of the damages the jury recognized. Similarly, based on the extensive proceedings and the voluminous record in which the Court participated, the Court is not persuaded that TVT's apportionment of its labor and related costs as between the common law and federal statutory claims comports with a fair assessment of the parties' actual litigation efforts.

The Court recognizes that there cannot be a categorical or formulaic correspondence between the damages actually recovered on the federal claims and the amount of attorneys' fees and costs eligible for reimbursement under the statute. Conceivably, the litigation of some complex matters may legitimately demand commitment of resources that in the end may be out of proportion with modest achievement in respect of some claims, while greater results are attained as to other interrelated claims. That eventuality should not by itself serve to bar recovery of the prevailing party's reasonable fees and costs properly incurred in pursuit of the less successful though meritorious claim. *See Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1183 (2d Cir 1996) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)).

At the same time, however, the Court does not accept Defendants' contention that not more than five percent of TVT's litigation costs relate to and may be imposed on Defendants by reason of the relatively small recovery and

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[5] With regard to its willful copyright infringement claims, TVT subsequently elected to receive, in lieu of actual damages, profits and punitive damages, the $150,000 statutory damages award determined by the jury. See *TVT*, 279 F. Supp. 2d at 416-17, n.3.

lesser prominence of the infringement claims in relation to the common law causes of action and their more triumphal outcomes. Although TVT's infringement claims generated substantially less litigation activity and recovery, the element of fraud that was integral to each of TVT's common law actions was also a critical aspect of its willful infringement claims. Consequently, significant amounts of the litigation activities and attendant costs required by the copyright actions, and that may appear to have been undertaken here predominantly in pursuit of the common law claims, in fact would have been necessary to support effective litigation of the infringement claims even if the common law actions did not exist. To this extent, the Court considers an apportionment of 50 percent of the litigation costs as more fairly reflecting a proper division of litigation expenses as between TVT's copyright infringement and the common law claims.

Nonetheless, TVT's application for attorneys' fees and costs seeks an award encompassing all expenses relating to its willful infringement claims and supplemental awards for the balance of TVT's litigation costs pertaining to those and/or its other claims. For the purposes of passing upon TVT's instant motion, the Court considers the evidence pertaining to the exceptional difficulties and burdens associated with prosecution of this litigation and reiterates its findings set forth in this regard in the Remittitur Decision. The Court deems these considerations appropriate and sufficient to warrant exercise of its discretion to grant TVT's motion in part for an award of attorney's fees and costs in respect of TVT's infringement claims to the extent recoverable. However, the Court finds insufficient basis to support any fee enhancement under the theories advanced by TVT. First, the Supreme Court has established a strong presumption that the lodestar represents the reasonable fee under the federal fee-shifting statutes and thus has substantially narrowed, if not effectively abolished altogether, the circumstances which justify enhancements. *See Loper v. New York*

City Police Department, 853 F. Supp. 716, 721 (S.D.N.Y. 1994) (concluding that "fee enhancements under the fee-shifting statutes are no longer permissible in this Circuit") (citing *City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992)).

Second, even insofar as this Court finds adequate grounds to support TVT's recovery of attorneys' fees, it cannot approve such an award with regard to TVT's original application to the extent TVT's punitive award is ultimately sustained in the amount remitted. In reviewing Defendants' motions for remittitur, the Court considered that the extraordinary size of the punitive award, an aggregate of $ 108 million, gave rise to a strong and reasonable inference that the jurors must have fully taken account, in their calculus of the award sufficient to achieve the level of punishment and deterrence of Defendants appropriate in this case, all permissible grounds and elements supported by the evidence they heard, including TVT's litigation expenses.

The Court's ruling on Defendants' remittitur motions reduced the jury's punitive damages award to an aggregate of $ 29,125,000, which TVT elected to accept in lieu of a new trial. Whether or not TVT's litigation costs entered into the jury's damages verdict, in determining the remitted award the Court itself considered the adjusted amount to constitute the penalty sufficient to achieve fully the relevant functions of punitive damages under the totality of the circumstances evidenced here. To this end, the Court specifically weighed in the mix both the appropriate punishment of Defendants' misconduct and its deterrence in the future, as well as recognition of the law enforcement incentive that is embodied in punitive damages awards as described above. The Court also weighed that in this case the jury assessed a substantial compensatory award essentially redressing the entire amount of the losses TVT claimed, and that, as elaborated in the Remittitur Decision, under some circumstances a compensatory damages award that essentially makes the

victim whole serves a punitive function as well. *See TVT*, 279 F. Supp.2d at 424-25 (citing *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 1525, 155 L. Ed. 2d 585 (2003)).

Accordingly, the Court concludes that granting TVT's separate application for attorneys' fees and costs would represent a duplication of recovery to the extent the request relates to factors that were already recognized and presumably reflected, even if not explicitly articulated as such, in the jury's punitive damages awards, even as remitted. Had the punitive awards assessed far less, for example, in proportions nearer to or less than the amount of TVT's total litigation expenses admitted in evidence, the Court's supposition concerning the probable reflection of these costs in the verdict would not be warranted. In that event, a more compelling basis might exist to support a separate award to TVT for attorneys' fees and costs.[6]

With respect to TVT's supplemental application for post-trial litigation expenses, however, the amounts requested were not before the Court and jury at the time the verdict was rendered, and thus could not have figured as a

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[6]The Court is mindful that in the realm of possibilities it is conceivable that on appeal of this Court's punitive damages ruling the Circuit Court, even if it were to affirm the legal basis supporting an award, might find grounds upon which to direct a further reduction of the amount of the penalty, without explicitly embodying in the appellate determination specific consideration of how such lower award might affect TVT's prospects for justified recovery of attorney's fees and costs. In that event, TVT could seek clarification from the Circuit Court as to whether any such additional remittitur were meant to reflect recognition of litigation costs as a factor, and propose a remand for the purposes of any adjustment indicated by this consideration. If any such award as further modified does not adequately reflect fees and costs, TVT could petition this Court to reopen this matter so as to examine the litigation costs request in light of the circumstances then prevailing.

consideration in the size of the punitive award, either as assessed by the jury or as remitted. For this reason, the Court is inclined to recognize and grant in part TVT's supplemental application on the basis of the same apportionment described above with regard to TVT's original request.

Having reviewed the documentation TVT has submitted in support of its application, however, the Court is persuaded that some downward adjustment in the lodestar figures and other supplemental fees and costs requested is warranted. The reductions relate to expenses that reflect substantial inefficiencies or seem excessive or inappropriate. The Court agrees with Defendants' observations, for example, that the number of attorneys engaged in TVT's post-trial efforts, a total of 10, appears to be insupportably high, and that certain travel costs and other unrecoverable fees claimed should be substantially discounted or disallowed. The Court, however, rejects Defendants' contentions that certain third-party litigation-related invoices TVT paid directly by that reason alone should be disallowed, and that the costs of electronic research are not recoverable in connection with TVT's application. *See Gonzalez v. Bratton*, 147 F. Supp. 2d 180, 212-13 (S.D.N.Y. 2001), *aff'd*, 48 Fed. Appx. 363 (2d Cir. 2002) (citing cases). Accordingly, to effectuate the decreases and disallowances adopted here, the Court will reduce TVT's lodestar figure by 20 percent, and lower the other expenses claimed also by 20 percent.

Of the $ 494,474.35 TVT requested, $ 125,162.42 represent fees directly related to TVT's motion for attorneys' fees. As part of the apportionment between expenses reasonably attributable to the infringement claim and expenses attributable to the other claims the Court will not reduce that amount by 50 percent, but rather by 25 percent, thus yielding for this purpose a starting base of $ 93,871.82. This determination is grounded on the premise that where litigation entails complicated and interrelated multiple claims, some permitting recovery of legal expenses and others not,

the preparation of an application for attorneys' fees raises unique difficulties that necessarily entail devoting additional effort and resources in parsing out the claims and their respective allocations of costs and in gathering the corresponding supportive documentation pertaining only to the recoverable expenses. However, the Court will reduce the threshold figure by an additional 20 percent to reflect the same sources of inefficiencies or excessive expenditures identified above with regard to the balance of the application. Thus, the allowable costs related to the preparation of TVT's attorneys' fees motion total $ 75,097.75.

Reducing the remaining $ 369,311.93 by 50 percent to account for the Court's apportionment as discussed above yields $ 184,655.97. Applying to this number the further 20 percent to reflect the reductions and disallowances described above produces $ 147,724.78. Adding to this figure the $ 75,097.75 allowed with respect to the preparation of TVT's attorneys' fees application results in a total award of $ 222,822.53 attributable to TVT's post-trial supplemental litigation costs. The Court consequently will authorize entry of an amended judgment in favor of TVT for an additional amount of $ 222,822.53.

ORDER

For the reasons discussed above, it is hereby

ORDERED that the motion of plaintiffs TVT Records and TVT Music, Inc. ("TVT") for an award of attorneys' fees and costs incurred in connection with this action, as set forth in TVT's supplemental request dated September 16, 2003, is granted in part as set forth in this Order; and it is further

ORDERED that the Clerk of Court is authorized to enter an amended judgment in this action in favor of TVT and against Defendants The Island Def Jam Music Group and Lyor Cohen, jointly and severally, in an additional amount of $ 222,822.53 representing post-trial attorneys' fees and costs TVT incurred in prosecuting this action; and it is further

ORDERED that in other respects TVT's motion for attorneys fees and costs is DENIED, without prejudice to TVT's renewal of its motion insofar as appropriate under the circumstances described in the decision above.

SO ORDERED.

TRANSCRIPT EXCERPTS OF HEARING: RULE 50(a) MOTION

(At the sidebar)

MR. ORTNER: Sorry for the delay, your Honor. We move to dismiss under Rule 50 on the following grounds. First, let me take the breach of contract claim which I believe is Count 2.

MR. HAVILAND: If this is going to be lengthy, would it make sense to go into chambers, your Honor?

MR. ORTNER: It's going to be somewhat lengthy.

THE COURT: Are you going to go into details of what your claims are?

MR. ORTNER: Not too much. Let me try it this way, and if your Honor feels we should move, we'll move. Just in summary, in order to prove a breach of contract claim the plaintiff must demonstrate that there was damage. There is no evidence for this jury on damage.

First of all, they point to the August 2002, which is our alleged repudiation letter, as constituting a breach of our contract, our alleged contract with TVT. Assuming arguendo that that was a breach, it did not cause any damage. The testimony of Irv Gotti was uncontradicted, he did not know about that letter, he did not stop working as a result of that letter on the CMC project. He continued working. This is uncontroverted -- uncontradicted --- he continued working on that project in September and October 2002. He explained the reasons why he was upset that he could not include -- because Mr. Gottlieb did not give him permission to -- include three masters that he wanted to include in the Ja Rule album. But he never stopped working. There is no evidence that he stopped working on this.

So, he actually -- all the evidence is that he is continuing to and intends to go forward with completion of the

album, so there is no evidence in the record that our alleged withdrawal of consent in any way contributed to Mr. Gotti not continuing to work. By the way, there is no evidence whatsoever that Ja Rule stopped working. None.

Secondly, it is the burden of plaintiff to show that it has been damaged. Even if the jury disbelieves Mr. Gotti's explanation for the change of the release date, the plaintiff requires affirmative evidence that the August 2002 letter or some other act attributable to defendant, IDJ, caused Gotti and Ja Rule to not perform and, therefore, the withdrawal of our consent caused damage. There is no evidence to support that.

Secondly, even assuming -- this is a new point -- no damage for another reason under the Copyright Act, Section 204.

THE COURT: I think this is going to take longer. Let me send the jury out for ten minutes and we will finish it.

(In open court)

THE COURT: Why don't we take the afternoon break earlier than usual at this point, because this sidebar may take a little longer, and I don't want to keep you waiting. So why don't we take a ten minute break at this point.

(Jury not present)

THE COURT: All right. Mr. Ortner, you may resume.

MR. ORTNER: Your Honor, turning to the second reason why this court should dismiss because of a failure to prove damage attributable to any act constituting breach of contract on the part of Def Jam, I refer the court to 17 U.S.C., Section 204(a), which requires delivery of a signed copyright conveyance before exclusive rights can be conveyed to a grantee. Let me explain the significance of that in the context of this case.

Your Honor has before you Defendant's Exhibit A, which is the Ja Rule agreement under which Ja Rule agrees to furnish his exclusive services to Def Jam.

Section 501(a) read together with Section 1301 made clear that everything that's recorded during the term of Ja Rule's recording agreement belongs exclusively to IDJ. Everything. Regardless of whether the recordings are made for someone else, everything belongs to IDJ, including all copyrights. This is critically important for this reason:

According to the memorandum agreement, the object of this project was to obtain for TVT the exclusive right to distribute the new CMC recordings in the form of an album. Now, a person can enter into an agreement today, providing that anything created after today, anything created in a copyright sense, anything recorded will belong to his or her record company even if the recordings take place in the future, as long as that agreement provides that all recordings recorded during the term belong to the record company. In this case, Ja Rule has an agreement that says everything belongs to Def Jam, everything he records, no matter for whom.

In order for TVT to have accomplished its objective -- which was obtain the right exclusively to get the recordings of the new CMC album and to distribute those exclusively -- TVT needed a conveyance by Def Jam of an exclusive conveyance of copyright entitlement with respect to the songs to be recorded for this CMC album project for TVT.

Now, your Honor is familiar, of course, with the statute of frauds, where even if there is a signed document sufficient to constitute a contract, the failure to deliver that document does not make out the failure to enter into a contract. But the Copyright Act is different. The Copyright Act goes beyond the standard statute of frauds and says under Section 17 U.S.C., 204(a), there not only must be a signa-

ture, there must also be delivery; assuming arguendo, assuming for purposes of this motion that the side letter was sufficient to grant the copyright conveyance to TVT to achieve TVT's objectives to have an exclusive grant, assuming that's the case that had to be delivered.

Therefore, even if you make out a contract, it had to be delivered to TVT. So even if TVT makes out the existence of a contract, arguing that the delivery of a signed document wasn't necessary to establish a contract, the failure to deliver prevented TVT from getting the copyright grant, and in the absence of the copyright grant TVT could not release the CMC album. And if TVT could not release the CMC album, it suffered no damages from our alleged briefs by withdrawing or repudiating an unsigned document.

Let me turn to promissory estoppel. Promissory estoppel requires reasonable reliance on the part of TVT on an alleged oral promise.

On this record, your Honor, this jury cannot find reasonable reliance for several reasons, among others:

One, the parties clearly manifested their intention to have a written signed agreement with everybody signing and returning the signatures. That's number one. It never happened.

Two, given the testimony that the jury has heard about the prior history of threats by Lyor Cohen, the prior conduct of the parties, the on again/off again by Def Jam and Lyor Cohen, no rational jury could determine here that TVT could reasonably rely upon any oral promise.

In addition, even if the jury could make that determination with respect to Def Jam, there is no evidence with respect to Lyor Cohen, who is also named as a defendant, there is no evidence that Mr. Cohen acted outside the scope of his authority. So even if your Honor believed there was a sufficient question to go to the jury with respect to whether

promissory estoppel entitles TVT to assert the existence of a contract, there can be no liability asserted against Mr. Cohen personally, because there is no evidence that his actions were in any way other than acting within the scope of his authority as the chairman of IDJ. Therefore, he should be dismissed if both defendants are not.

Now let me turn to tortious interference. In order for there to be tortious interference, it must be demonstrated that there is evidence to go to the jury that there was a breach by Gotti or Ja Rule which was caused by Def Jam or Cohen. Remember, both of them are defendants in that count. There is no evidence, not a single bit of evidence, that Gotti or Ja Rule stopped performing their contract. I have already summarized that for your Honor and I won't repeat it. But any assertion that anything that was done by Mr. Cohen or Def Jam to induce a breach by Gotti and Ja Rule of their agreement with TVT is purely a matter of speculation. There is no evidence to support it. There is no evidence of interference. There is no evidence of any threats. There is nothing in the record.

In addition, if your Honor was inclined to allow the jury to hear that claim with respect to Def Jam, there is no evidence that Lyor Cohen was acting outside the scope of his authority and was acting in any capacity other than as the chairman of IDJ.

Fraud: The fraud claim is nothing more than an effort to get around the fact that there was no breach of contract. It's dressing up a breach of contract claim in an aggravated description of what went on here. They are trying to circumvent the law of contract and impose fraud liability when there is no contract.

First, there is no evidence of scienter. There is no evidence that Cohen or IDJ intended to defraud TVT. Not a scintilla of evidence. We said yes, we said no. That's not

fraud. That's waffling, but it's not fraud. Fraud means and needs more.

There is no evidence, your Honor, of any reasonable reliance by TVT on any promise or any silence. Not a single bit of evidence in the fraud context. It was patently unreasonable, given the prior history of the parties, Cohen's threats in the past, as alleged by Mr. Gottlieb, the way TVT does business in terms of its contracts have to be signed before its bound or it pays, and Cohen's extreme reluctance, as the jury sees both from the testimony from Mr. Cohen and other witnesses from IDJ, but also the testimony of Mr. Gottlieb, it was patently unreasonable to rely upon any oral promises. There is no demonstration of any reliance. There is no demonstration that there was any material misrepresentation in anything that was said, no intent to defraud.

Now, even if your Honor believes there is a sufficient basis to go to the jury on a fraud claim against Def Jam, I again say to you that Lyor Cohen was acting within the scope of his authority. There is not a single bit of evidence to demonstrate that Mr. Cohen in any way acted other than in his capacity as the chairman of IDJ. Therefore, any claim of fraud against Lyor Cohen must be dismissed as a matter of law.

Let me now turn to the copyright claims. First, let me turn to "Get the Fortune." There is no basis to go to this jury on an assertion that there was anything other than a valid, fully enforceable license agreement. They claim fraud. There is no evidence of fraudulent representations or omissions by any representative of Def Jam with respect to the "Get the Fortune" license. There is no evidence of any communication by Mr. Gottlieb to Def Jam. He operates on assumptions that people understand what is in his mind. No evidence to indicate any material representation or material omission on the part of Def Jam. It was the secret intent of

Mr. Gottlieb unexpressed. That doesn't subject our license to a claim that it was vitiated by fraud.

There may be disappointment on the part of Mr. Gotti that his expectation that there would be this album on his schedule failed to materialize. That is not fraud. And there is no evidence at all in any portion of this record indicating that Lyor Cohen in any way was involved with that alleged fraud, or in connection with the licensing, or in connection with anything to do with "Get the Fortune" and the incorporation of "Get the Fortune" into the "Irv Gotti Presents" project.

Second, "The Rain". There was oral consent to Gotti. That's the admitted testimony of Mr. Gottlieb. Oral consent equals a nonexclusive license as a matter of law. There is no basis for this jury to take the position or to find that there was no license to Def Jam.

Mr. Gottlieb admitted that he knew when giving oral consent to Mr. Gotti to use "The Rain" in the CD that it was for the purposes of incorporation in the "Irv Gotti Presents the Inc." CD. He also testified today that he knew that Def Jam was the distributor of that CD. Therefore, all that can be said here is that there was an intent on the part of TVT to give consent to Irv Gotti for the benefit of Def Jam to distribute, and Def Jam is entitled to rely upon that license. Therefore, there can be no copyright infringement claim.

There is also no evidence of fraud in procuring that license for the same reasons that I described before with respect to "Get the Fortune." And fundamentally there is no evidence at all that Lyor Cohen played any role with respect to this project, including obtaining the license for "The Rain". No claim of fraud relating to Cohen.

Even if your Honor believes that there is a question for the jury with respect to whether the oral consent was enforceable or was vitiated by this alleged fraud -- and I assert to your Honor that there is no basis for your Honor to

find fraud there and to vitiate that license -- there isn't a drop of evidence relating to Lyor Cohen, and he must be dismissed.

In fact, Judge, it's very clear that these claims against Lyor Cohen are simply harassment, and they should be viewed as exactly what they are. There is either a contract here or there is no contract. If there is a contract and if Def Jam breached it and caused damage, that doesn't add up to any liability for Lyor Cohen. But all these theories, all these claims are asserted for one reason, which is to sweep Mr. Cohen into what is really a breach of contract claim and seek to impose liability on him when there is no evidence to support any assertion or any finding that Mr. Cohen acted in any way other than strictly in his capacity as the chairman of Def Jam at all times.

Finally, your Honor, the only claim that TVT Music can assert in this case is the assertion with respect to the "Get the Fortune" claim, because that relates to the utilization of a song, a license for the song, musical composition "Get the Fortune." TVT Music has no standing to assert any contract claims or any other claims in this case, and I respectfully request that your Honor dismiss all claims brought by TVT Music. Even if your Honor keeps alive any claim by TVT Music with respect to "Get the Fortune", TVT is not a plaintiff or a proper plaintiff with respect to any other claims. Thank you.

THE COURT: Thank you. Mr. Haviland.

MR. HAVILAND: Well, your Honor, I am reluctant to go through all of these claims in light of the fact that these are all the subject of matters that have been discussed with respect to jury instructions that are pending, but I will briefly respond if the court is really going to consider this motion.

With respect to the breach of contract claim, we have presented evidence of the formation of a contract. Certainly

Mr. Gottlieb has testified that there was an agreement between himself and Mr. Cohen.

With respect to the claim that there is an absence of damage resulting from IDJ's breach, the August 2002 letter, there is evidence it was copied to Mr. Gotti and to his lawyer Mr. Branca. The jury could reasonably assume that they were on notice of that and acted accordingly by ceasing to perform work in support of the CMC album.

The evidence in the record that exists is that after at least August of 2002 Mr. Gotti's only work with respect to the CMC album was to remove CMC recordings from "The Last Temptation" album and rerecord it in order to facilitate the release of "The Last Temptation" album.

So, we believe that we have established at least evidence that the jury can consider with respect to the formation of a contract and damage.

With respect to the 17 U.S.C., Section 204(a) claim that Mr. Ortner raises, this claim is not a new position. It was one that was raised in briefing surrounding the preliminary injunction. And a jury can certainly reasonably conclude, A, by reviewing the Ja Rule exclusive services contract with Def Jam, if it is so inclined, that the recordings at issue there are recordings which are made for Island Def Jam and do not prevent the use of Mr. Rule's services pursuant to a separate legitimate contract, such as the heads of agreement, which we have presented evidence was both executed by Mr. Rule and approved by Island Def Jam.

Furthermore, we have raised in our previous briefing that this issue was a red herring because the conveyance that Mr. Ortner makes reference to would be a conveyance which would occur at the time, prior to the existence of any of the recordings at issue. All of the CMC recordings at issue were made after the execution of the head of agreement and the consent by Def Jam, and so there was no copyright to be conveyed pursuant to the side letter agreement.

With respect to reasonable reliance, the evidence is not that there was any intention by Mr. Cohen or Mr. Gottlieb to condition the performance of the contract on what Mr. Ortner refers to as fully executed agreements and their delivery.

He has also suggested that no rational jury could conclude that Mr. Gottlieb could reasonably rely on assurances from Mr. Cohen in light of Mr. Cohen's threats. However, it is the testimony of Mr. Gottlieb that subsequent to a strenuous negotiation -- of which there is ample evidence in the record not only between Mr. Gottlieb and Mr. Cohen, but also between Mr. Gotti and Mr. Cohen, in which there were heated words during negotiations -- that ultimately an agreement was reached.

With respect to the tortious interference claim -- excuse me, your Honor. Mr. Ortner raises that with respect to the promissory estoppel claim that no reasonable reliance is possible and also that Lyor Cohen, that there was no evidence that he acted outside the scope of his authority or had any intent to act outside the scope of his authority. However, the very threats that Mr. Ortner makes reference to suggest a personal animus by Mr. Cohen against Mr. Gottlieb, a threat to blackball him in the industry, reference to prior negative experiences in which Mr. Cohen felt specifically ill will towards Mr. Gottlieb, from which a reasonable jury could conclude that Mr. Cohen was acting not purely in the interests of Island Def Jam or in his capacity as a corporate officer but in order to carry out his expressed desire to blackball Mr. Gottlieb.

With respect to the tortious interference claim caused by Island Def Jam, we have presented substantial evidence that at the time of Mr. Gotti's scheduled release of the CMC album there were substantial incentives provided by Island Def Jam to cause those CMC recordings not to be delivered to TVT but instead to be delivered to Island Def

Jam Music group. And part of that incentive was the negotiation of a fourth album amendment with Ja Rule in which both Mr. Gotti through Top Dawg and Ja Rule would benefit with substantial receipt of a deal worth in the range of $8 million.

A jury can certainly conclude that those incentives, in combination with the express language of the August 5, 2002 approval memo, which indicated Island Def Jam's knowledge of the contract, desire to interfere with the contract, and a plan which was in fact carried out to prevent the actual delivery of the recordings to TVT was effective, and they are free to conclude from the objective evidence, irrespective of Mr. Gotti's testimony, that Mr. Gotti was in fact motivated by those circumstances.

The jury is also free to conclude, based on the evidence presented, that Mr. Gotti's testimony as to his particular motivations may not be credible.

I point out that with respect to Mr. Cohen's personal involvement in the tortious interference claim, Mr. Ortner, as he knows, misstates the standard. There is no requirement that Mr. Cohen be shown to be acting ultra vires. A corporate officer may be held liable for tortious interference even if acting within the scope of his authority as a corporate officer.

With respect to fraud, your Honor, I believe that this case fundamentally is a case about fraud, and I believe that the fraud is principally perpetrated by Mr. Cohen personally.

We observed his testimony here in which he repeatedly perjured himself on the stand and in which he made clear by his own declaration that he was in the process of negotiating an agreement with TVT, without ever having the intention to perform it.

He caused TVT to rely on such performance through a variety of meetings which are well established in the re-

cord. It's clear that TVT did rely by its performance under the agreement. And Mr. Cohen intentionally withheld and concealed his intent not to permit this to go forward over a long period of time.

Once again, Mr. Cohen need not for purposes of that consent of that claim be deemed to be acting out ultra vires but can be acting as a corporate officer and still be liable for fraud, as the court well knows.

With respect to the copyright claims, our position with respect to copyright has been clear all along. We have contended, and I believe that we have shown that following August of 2001 -- in which the consent to this agreement was given by IDJ -- IDJ repeatedly ratified that consent by its failure to at any time object to the knowledge that Irv Gotti, Ja Rule and others were proceeding with the CMC recordings.

There is in the record now an e-mail which includes a reference by Mr. Kempler that he was aware at the time that the license agreement was being discussed between IDJ and TVT, that he himself had an expectation that that license would be issued in part on the basis of the CMC album proceeding with TVT.

So, there was a continuing fraud by concealment by IDJ continuously from the period of time commencing with the agreement which was entered into and continuing through the granting of these licenses, which Mr. Gottlieb has stated unequivocally would not have been granted but for the understanding that these materials, these copyrighted materials, would be used in furtherance of a CMC album which IDJ in fact never intended to permit to go forward.

So, our view is that a jury can and will reasonably conclude that TVT reasonably relied upon the assurances which were continuous, that it would be able to proceed with this CMC project, that it set up the CMC project through

the "Irv Gotti Presents the Inc." releases, and that it only granted these on a fraudulent condition.

With respect to Lyor Cohen, once again Lyor Cohen as chairman of Def Jam was at all times in a position to control and to financially benefit from the commercial exploitation of these materials on the "Irv Gotti Presents" DVD and CD. He was in fact copied on the license request along with Mr. Kempler, and a jury can reasonably conclude that having been copied on such communication he was aware of it and in a position to stop it.

With respect to TVT Music, the simplest response is that TVT Music, as has been established, is a subsidiary company of TVT Records. Through the heads of agreement, TVT would have had rights and commercial benefit both from the exploitation of the sound recordings and from the publishing of those materials in which TVT Music had a financial interest. And so all of the claims related to the commercial exploitation of the CMC recordings are claims to which TVT Music has an interest in standing and so it should not be dismissed.

THE COURT: Thank you. Mr. Ortner, I am not going to allow any more argument. We have kept the jury waiting substantially.

MR. ORTNER: Can I have one minute?

THE COURT: I am going to defer judgment on all the claims until after the jury verdict is in. At that point we will see that the jury does, and I will rule on the motion at that point. All right?

MR. HAVILAND: Thank you, your Honor.

THE COURT: Bring the jury in.

MR. MERVIS: Before we do that, just as a matter of housekeeping, our first presentation to this jury is going to be the reading of some deposition transcript from the deposition of Miss Savcic, and Miss Miller will play the witness, and in order so the jury is not confused, perhaps the

court would consider a brief instruction or an explanation to the jury as to what is being done.

THE COURT: All right. You are going to bring the jury in? Let me remind the parties again about the importance of getting your draft jury instructions by the close of business. Close of business of the court is not close of business for counsel. 5 o'clock. So we're able to work on it overnight and have matters ready by the morning. I am talking about the verdict sheet.

MR. HAVILAND: Your Honor, I can say for plaintiffs that we are not going to be in a position to present the proposed verdict sheet by 5 o'clock today. I would think that we could have something to the court by not later than 8 o'clock.

THE COURT: Mr. Mervis?

MR. MERVIS: I would think that we would also be in a position to have something by 8 o'clock. What might not be possible would be a meaningful meet and confer with opposing counsel at that time, but we can certainly try to meet and confer after the submission to the court.

MR. HAVILAND: Alternatively, we might be able to present a joint submission which would be faxed late in the evening or early tomorrow morning.

THE COURT: The difficulty is that if we are not ready by tomorrow, the court is going to have to hold this jury one more day. All right. Let's bring the jury in.